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Commission on
International
Trade Law**

YEARBOOK

Volume IX: 1978



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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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INTRODUCTION

This is the ninth volume in the series of Yearbooks of the United Nations Commission on International Trade Law (UNCITRAL).¹ This volume covers the period from July 1977 to the end of the Commission's eleventh session in June 1978.

The present volume consists of three parts. Part One completes the presentation of documents relating to the Commission's report on the work of its tenth session by including material (such as action by the General Assembly) which was not available when the manuscript of the eighth volume was prepared. Part One also contains the Commission's report on the work of its eleventh session which was held in New York from 30 May to 16 June 1978.

Part Two reproduces most of the documents considered at the eleventh session of the Commission, including documents that form an integral part of the preparatory work and drafting history for the draft Convention on Contracts for the International Sale of Goods.

Part Three contains the Final Act of the United Nations Conference on the Carriage of Goods by Sea, which was held in Hamburg, Federal Republic of Germany, from 6 to 31 March 1978; annex I of the Final Act sets forth the text of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) which was adopted by the Conference. In addition, Part Three contains a bibliography of recent writings related to the work of UNCITRAL and a check list of UNCITRAL documents.

¹ To date, the following volumes of the *Yearbook of the United Nations Commission on International Trade Law* [abbreviated herein as *Yearbook* . . . (year)] have been published:

Volume	Years covered	United Nations publication, Sales No.
I	1968-1970	E.71.V.1
II	1971	E.72.V.4
III	1972	E.73.V.6
IV	1973	E.74.V.3
V	1974	E.75.V.2
VI	1975	E.76.V.5
VII	1976	E.77.V.1
VIII	1977	E.78.V.7

I. THE TENTH SESSION (1977); COMMENTS AND ACTION WITH RESPECT TO THE COMMISSION'S REPORT

A. United Nations Conference on Trade and Development (UNCTAD): extract from the report of the Trade and Development Board (second part of the seventeenth session)*

E. *Progressive development of the law of international trade: tenth annual report of the United Nations Commission on International Trade Law (agenda item 6 (b))*

26. At its 495th meeting, on 4 April, 1978, the Board took note with appreciation of the report of the United Nations Commission on International Trade Law on the work of its tenth session, which had been circulated under cover of document TD/B/664.

* *Official Records of the General Assembly, Thirty-third Session, Supplement No. 15 (A/33/15)*, vol. I, part three. Chapter II: Institutional, organizational, administrative and related matters.

B. General Assembly: report of the Sixth Committee (A/32/402)*

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INTRODUCTION

1. At its 5th plenary meeting, on 23 September 1977, the General Assembly decided to include in the agenda of its thirty-second session the item entitled "Report of the United Nations Commission on International Trade Law on the work of its tenth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 4th to 11th meetings, from 28 September to 6 October, and at its 47th and 68th meetings, on 16 November and 9 December.

3. At the 4th meeting, on 28 September, Mr. N.

Gueiros (Brazil), Chairman of the United Nations Commission on International Trade Law at its tenth session, introduced the Commission's report on the work of that session (A/32/17).¹

4. At the 47th meeting, on 16 November, the Rapporteur of the Sixth Committee raised the question whether the Committee wished to include in its report to the General Assembly on the item a summary of the main trends that had emerged during the debate on the Commission's report. After referring to General Assembly resolution 2292 (XXII) of 8 December 1967

* 12 December 1977. *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 113.

¹ [Yearbook . . . 1977, part one, II, A.] The presentation of the report was pursuant to a decision by the Sixth Committee at its 1096th meeting, on 13 December 1968 (see *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 88, document A/7408, para. 3 [Yearbook . . . 1968-1970, part two, I, B, 2]).

concerning publications and documentation of the United Nations, the Rapporteur informed the Committee of the financial implications of the question. At the same meeting, the Sixth Committee decided that, in view of the nature of the subject-matter, the report on agenda item 113 should include a summary of the main trends of opinion that were expressed during the debate.

5. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, and in keeping with past practice, the report of the Commission on the work of its tenth session was submitted to the United Nations Conference on Trade and Development (UNCTAD) for comments. However, since the tenth session of the Commission had been held later in the year than usual, the report on the work of that session could not be made available to UNCTAD in sufficient time to enable the item to be considered by the Trade and Development Board at the first part of its seventeenth session, held from 23 August to 2 September 1977. Accordingly, at its 470th meeting, on 25 August 1977, the Board decided to defer consideration of the item until the second part of its seventeenth session.²

PROPOSALS

6. At the 47th meeting of the Committee, a draft resolution (A/C.6/32/L.8) was submitted by Austria, Brazil, Canada, Cyprus, Egypt, Finland, Ghana, Greece, Guatemala, Indonesia, Jordan, Kenya, Morocco, Nigeria, Peru, the Philippines, Sierra Leone, Singapore, Spain, Turkey, the United Republic of Tanzania, Yugoslavia and Zaire, later joined by Argentina, Hungary, Lesotho and the Sudan. [For the text see para. 44 below.]

7. At the 68th meeting, on 9 December, a second draft resolution (A/C.6/32/L.14) was submitted by Austria, Cyprus, Ghana, Greece, Kenya and Sierra Leone.³ The draft resolution read as follows:

"United Nations Conference on the Carriage of Goods by Sea

"The General Assembly,

"Recalling its resolution 31/100 of 15 December 1976, by which it decided to convene an international conference of plenipotentiaries to consider the adoption of a convention on the carriage of goods by sea,

"Recalling further that paragraph 4 (g) of resolution 31/100 requests the Secretary-General to invite to the Conference, as observers, among others, 'interested regional intergovernmental organizations',

"Taking note of the view expressed by the United Nations Commission on International Trade Law at its tenth session regarding the desirability of also inviting to the Conference, as observers, interested intergovernmental organizations of a non-regional character and non-governmental organizations, particularly those that had participated in the Com-

mission's work on the subject-matter of the Conference (see A/32/17, para. 58),

"Noting also that the Secretary-General has, pursuant to paragraph 2 of resolution 31/100, authorizing the convening of the Conference in New York 'or at any other suitable place for which the Secretary-General may receive an invitation', accepted an invitation by the Government of the Federal Republic of Germany to hold the Conference at Hamburg from 6 to 31 March 1978,

"1. Expresses its appreciation to the Government of the Federal Republic of Germany for its offer to host the United Nations Conference on the Carriage of Goods by Sea at Hamburg from 6 to 31 March 1978;

"2. Requests the Secretary-General to invite to the Conference, as observers, in addition to the organizations, national liberation movements, agencies and United Nations organs, referred to in resolution 31/100 of 15 December 1976, interested intergovernmental organizations, and non-governmental organizations which have participated in the work of the United Nations Commission on International Trade Law relative to the subject-matter of the Conference."

DEBATE

8. The major trends of opinion expressed in the Sixth Committee on the report of the Commission on the work of its tenth session are summarized in sections A to I below. Sections A and B deal with general observations on the role and functions of the Commission and on its working methods, while the remaining sections are devoted to the Committee's deliberations on the specific topics considered by the Commission at its tenth session, as follows: international sale of goods (sect. C); international payments (sect. D); international commercial arbitration (sect. E); liability for damage caused by products intended for or involved in international trade (sect. F); training and assistance in the field of international trade law (sect. G); future work (sect. H); and other business (sect. I).

A. General observations

9. As in the past, representatives stressed the importance of the Commission's work. The view was generally shared that the work of the Commission in the unification, harmonization and progressive development of the law regulating international trade helped to remove obstacles to the flow of such trade on equitable terms, encouraged the development of healthy trade policies and created a climate of confidence for transnational transactions. All this could not but serve the larger end of promoting friendly relations and co-operation among States, thus contributing to world peace and security.

10. Representatives were equally favourable in their assessment of the progress thus far made by the Commission, its Working Groups and the Commission's secretariat in carrying out the Commission's work programme, as attested to by the number of highly significant texts which had emerged from the Commission in its relatively brief period of existence. The draft Convention on the International Sale of Goods which the Commission had placed before the General Assembly at the present session was one more mark of such progress.

² See *Official Records of the General Assembly, Thirty-second Session, Supplement No. 15 (A/32/15)*, vol. II, para. 217. The second part of the seventeenth session of the Board is scheduled for 4 April 1978.

³ At the same meeting, the Chairman announced that the sponsors did not wish to press for a vote on draft resolution A/C.6/32/L.14 and had agreed to a proposed consensus decision by the Committee on the subject-matter of their draft resolution. [For the decision, see para. 45 below.]

11. Referring to the special needs of developing countries, a number of representatives urged the Commission to take greater account thereof in its work. The view was also expressed that the Commission could do more than it had so far done to promote the implementation of the goals of the new international economic order as outlined in the resolutions of the sixth and seventh special sessions of the General Assembly.

12. Recalling that the tenth session of the Commission had been held at Vienna at the invitation of the Government of Austria, representatives expressed appreciation to that Government for its generosity in acting as host to the session.

B. Working methods of the United Nations Commission on International Trade Law

13. Continued approval was expressed by representatives of the working methods followed by the Commission and its Working Groups. Much of the progress made by the Commission, it was noted, was owed to the efficiency of such working methods and especially to the system of conducting its substantive work through expert Working Groups, each of which concentrated on specific subjects assigned to it by the Commission.

14. Favourable notice was also taken by representatives of the practice by which the Commission, through its secretariat, consulted and, to the extent possible, collaborated with other United Nations bodies and with intergovernmental organizations and international and regional non-governmental organizations active in the particular fields of interest to the Commission. The importance of such practice both in avoiding wasteful duplication of efforts and in ensuring that the Commission's work was properly influenced by the widest possible range of views could not, it was stated, be over-emphasized.

C. International sale of goods

15. Stressing the central position occupied by the law of sales in international trade law, many representatives commended the Commission and its Working Group on the International Sale of Goods for the successful accomplishment of the work on a draft Convention on the International Sale of Goods which, it was observed, marked the high point of its tenth session. The text produced by the Commission (see A/32/17, para. 35) provided, it was said, an excellent basis for a convention on the subject.

16. With regard to the Commission's recommendation that the General Assembly should convene at an appropriate time a conference of plenipotentiaries to conclude, on the basis of the draft Convention approved by the Commission, a Convention on the International Sale of Goods, most representatives expressed themselves in favour of such a conference at an appropriate time. It was, however, recalled in that connexion that the Commission intended to place before the thirty-third session of the General Assembly draft provisions on the formation and validity of contracts for the international sale of goods, together with appropriate recommendations on the action to be taken in respect of those draft provisions. Those recommendations would presumably deal with the questions whether such rules on the formation and validity of contracts should be incorporated into the Convention

on the Sale of Goods or should be the subject-matter of a separate Convention and, if the latter, whether both texts should be considered by one and the same conference or two separate conferences. For that reason, a number of representatives thought it preferable to maintain flexibility on those questions and specifically to defer any decision on those matters until the Commission itself had considered them and made appropriate recommendations.

17. Most representatives, while not disagreeing with that last view, nevertheless emphasized the inter-relationship between rules on the formation and validity of contracts for the sale of goods and those regulating the rights and obligations of the contracting parties *inter se* and consequently the desirability at least of having both texts considered by the same conference of plenipotentiaries even if they were subsequently to be embodied in two separate conventions. Furthermore such a procedure, it was noted, had the added merit of being more economical.

18. On the question whether the set of rules on the international sale of goods elaborated by the Commission should be issued in the form of uniform rules for optional use by parties to a sales transaction rather than be embodied in a convention, most representatives expressed themselves in favour of the form of a convention as a binding multilateral treaty, for reasons similar to those stated in the Commission's report (*ibid.*, paras. 20-32). The view was also expressed, however, that resort might be had to alternatives other than the two mentioned above. Such alternatives might, for example, include constituting the Sixth Committee itself into a kind of conference of plenipotentiaries which would meet annually to adopt instruments that would become legally binding on the States voting on such issues. Another option could be to have States submit to the Commission their comments on the draft of a proposed Convention, such comments could then be incorporated into the draft text by the Commission and the text submitted to the General Assembly for adoption.

19. Although most representatives preferred to reserve for a later period their Governments' substantive comments on the provisions of the draft Convention produced by the Commission, a number of preliminary observations were nevertheless offered with respect to those provisions. Firstly, there appeared to be general agreement that in the text approved by the Commission the Commission's Working Group on the International Sale of Goods had achieved the stated objective of its work on that topic which, it was recalled, had been to consider and effect such revision of the text of the Uniform Law on the International Sale of Goods (ULIS) annexed to the 1964 Hague Convention as might make that text susceptible of wider acceptance by States having different legal, social and economic systems.⁴

20. Two particular features of the text received favourable notice in that regard. One of them was the fact that the text did not rely simply on juridical concepts familiar only to certain States but reflected a genuine attempt to blend concepts taken from the major legal systems of the world to the extent applicable. Similarly, it was noted, the text also sought to balance

⁴ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18*, para. 38, subpara. 3 (a) of the resolution contained therein.

more equitably the interests of the seller and of the buyer, of the developed and the developing countries. All of that, it was said, made for a text which was not only an improvement substantively over that of ULIS but was more likely than the latter text to receive widespread acceptance among States.

21. Many representatives expressed satisfaction at the fact that the Commission's text, while covering the same subject-matter, was considerably shorter and simpler than that of ULIS, making it more readily understandable and easier to work with. The view was also expressed, in respect to the provision of article 1, paragraph 3, whereby in the determination of the sphere of application of the Convention no regard is to be had to questions of the nationality or the civil or commercial character of the parties or of the contract, that the Commission had been well advised to exclude from the draft Convention notions such as nationality which were artificial and confusing.

22. Questions were, however, raised and reservations expressed with respect to various provisions of the draft Convention. Thus, for example, a number of representatives expressed the view that the scope of the draft Convention might be too restrictive, although the view was also expressed that the scope might be too broad as regards the kinds of contract sought to be encompassed, such as contracts for the supply of gas and electricity. Concern was also expressed with respect to the recognition in article 7 of existing trade usages for the reasons, it was said, that the provision introduced an element of uncertainty into contractual relationships and was, at any event, unduly favourable to the industrialized countries which had developed those usages and were more familiar with them. On the other hand, article 7 was cited as a noteworthy example of due flexibility in the provisions of the draft Convention, inasmuch as usage would play an important role in the interpretation and application of the principles contained in the draft.

23. Similarly, whereas the provisions of article 26 (delivery of goods free from third party industrial or intellectual property rights or claims) were well received by a number of representatives, the view was also expressed that the matter was outside of the province of the "sale of goods" proper and was, at any rate, of too complex a nature to be dealt with in the manner in which it had been by the Commission. A number of comments were also directed to the desirability of providing in the draft for the recovery of interest by a party damaged by a breach of contract.

24. Representatives, however, expressed the most doubts and reservations with regard to article 37 which provides that, in the event that a validly concluded contract does not state the price or indicate how such is to be determined, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract or, if that is not ascertainable, the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.

25. Numerous points were adduced in criticism of that provision: the provision was unfair to the buyer by, in effect, permitting the seller to fix the price of the goods when it had not been otherwise determined by the parties; if a valid contract was to be presumed in such a case, then the appropriate rule should be that the buyer pay a "reasonable price"; the provision was contrary to principles known to many legal systems,

for, price being of the essence of a contract of sale, its absence precluded the existence of a valid contract and thus left no room for the fixing of the price in the manner contemplated by the provision; the provision introduced unnecessary complication and uncertainty into contractual relationships; and, at any event, the provision dealt with a matter relating to the validity of the contract, which it was the avowed intention of the draft not to deal with.

26. The view was also expressed that since the effect of article 37 was that a contract was not nullified by the failure to fix a price, it would be preferable to bring that point out explicitly so as to avoid misinterpretation.

D. *International payments*

27. Several representatives took note of the continuing progress of work in the Commission in the field of international payments and a number specifically endorsed the Commission's decisions at its tenth session with respect both to security interests in goods and contracts guarantees as set forth in paragraph 37 of the Commission's report.

28. The necessity was, however, emphasized of carrying out further preliminary work, as the Commission proposed to do, to ascertain the practical need and relevance for international trade of uniform rules on security interests. In that regard, the view was also expressed that the need in that area could perhaps be adequately filled by rules on conflict of laws alone.

E. *International commercial arbitration*

29. Representatives uniformly expressed satisfaction at the favourable reception with which the UNCITRAL Arbitration Rules⁵ have met since their issue and noted the increasing recourse which was being made to those Rules by international commercial arbitration circles. The Asian-African Legal Consultative Committee (AALCC) was particularly commended for its decision to recommend to its members the use of the UNCITRAL Arbitration Rules in the settlement of disputes arising in the context of international commercial relations.

30. Many representatives also noted that AALCC had, at the tenth session of the Commission, put forward for the Commission's consideration certain proposals relating to the subject of international commercial arbitration, particularly the enforcement of arbitral awards. The issues raised by those proposals, it was observed, were very weighty and AALCC was to be commended for its initiative in that regard. It was also gratifying to note that the Commission had decided to give those matters thorough study and consideration.

F. *Liability for damage caused by products intended for or involved in international trade*

31. A number of representatives noted the Commission's decision not to pursue work on the subject of products liability at this time and voiced their agreement with that decision. The hope was, however, expressed that the Commission would take up the sub-

⁵ *Ibid.*, Thirty-first Session, Supplement No. 17 (A/31/17), para. 57 (Yearbook . . . 1976, part one, II, A).

ject again at a future time when conditions had become more conducive to such work.

G. *Training and assistance in the field of international trade law*

32. Widespread regret was expressed by representatives, especially those from developing countries, at the cancellation of the Second UNCITRAL Symposium on International Trade Law because of insufficiency of voluntary contributions to hold it. Representatives stressed the importance which their respective States attached to the training and assistance activity of the Commission, pointing out that it was only through the availability world-wide of the necessary expertise in international trade law that the goal of unification, harmonization and progressive development of that field of law could become a reality. Developing countries were anxious to participate actively in the development of international trade but had so far been handicapped by the lack of the requisite expertise. Furthermore, they had had to continue to depend on knowledgeable foreign trade-partners to carry on their own foreign trade.

33. It was also suggested in that regard that the Commission should consider ways, other than the holding of symposia, which seemed costly and too restrictive in the number of participants and subjects covered, to promote the development of expertise in international trade law, especially among third-world countries. Research assistance facilities through the United Nations University was one possibility mentioned in that connexion.

34. Divergent opinions were expressed with respect to the Commission's recommendation that the General Assembly consider the possibility of providing for the funding of the Commission's symposia on international trade law, in whole or in part, out of the regular budget of the United Nations. Several representatives stated that they did not favour that approach to the funding of the symposia. The Organization's budget had undergone a rapid increase in recent years and should not be burdened with that additional charge, especially in the light of other priorities. Furthermore, the meagreness of voluntary contributions towards its funding could itself be taken as indicative of a lack of interest in the programme by Member States. It was also urged, in that connexion, that the recommendation should not be viewed in isolation but should be measured against the established principles and precedents for the funding of United Nations activities. On that test the cost of holding the UNCITRAL symposia appeared to be of the kind that should be met out of voluntary contributions and not out of the regular United Nations budget.

35. However, most representatives who touched on the matter expressed support for the Commission's recommendations. While recognizing the need to avoid unnecessary charges on the regular budget of the United Nations, representatives nevertheless associated themselves with the Commission's recommendations for a number of reasons. Firstly, the importance of the programme itself had been repeatedly recognized both by the Commission and by Member States; the large number of qualified candidates from many States who had been recommended by their Governments to participate in the symposia was clear evi-

dence both of the value of the programme and the interest of States in its continuation. The Commission, it was recalled, had so far attempted to finance that activity by relying solely on voluntary contributions from Governments and from other sources, with disappointing results. It was only realistic, therefore, to recognize that the only way to continue that valuable programme was to make provision for it in the regular budget of the United Nations. As regards cost, it was noted that only a modest expenditure was involved: the total amount which had been required for the second UNCITRAL symposium was about \$US 25,000. Furthermore, voluntary contributions were not being ruled out; rather, funds would be made available from the regular budget of the United Nations only to supplement, if necessary, the amount received from voluntary contributions.

H. *Future work*

36. Representatives, noting with satisfaction that the Commission had completed, or was on the verge of completing, work on most of the priority items on its programme and as a result was now engaged in the process of drawing up a new work programme for the future, commended the Commission on the progress thus achieved. Satisfaction was expressed at the fact that the Commission had in that connexion embarked on a process of solicitation of views and consultations with Governments and interested intergovernmental and non-governmental organizations.

37. While indicating that their Governments' formal proposals had already been, or soon would be, communicated to the Commission, several representatives nevertheless mentioned a number of subjects and specific topics which the Commission should consider for inclusion in its new work programme. Among them were: the rules governing the transfer of ownership, *force majeure* clauses in contracts; transport insurance; dispatch agency agreements in the import and export of goods; rules for multimodal transport; contracts for economic co-operation (other than sales contracts); model contracts in fields other than the sale of goods, such as agreements between private parties on licensing and the transfer of technology; the problems created by economic concentration at the international level, including the activities of multinational enterprises, and harmonization of anti-trust legislation. It was also pointed out that the increasing involvement of States and public bodies in international trade had begun to raise questions regarding the border line between private and public law which could form the basis of work by the Commission in collaboration with other competent bodies.

38. Several representatives drew particular attention to the role which they thought the Commission could play in the task of restructuring international economic relations along the lines outlined in the resolutions of the sixth and seventh special sessions of the General Assembly relating to the establishment of a new international economic order. The Commission, it was urged, should not confine itself to the revision of existing texts or to work of a purely technical nature in already established fields. Important issues which could be dealt with in that context included: the elimination of discrimination in international trade; questions relating to raw materials and commodities, the

international monetary system and industrialization. The view was, however, expressed in that connexion that the Commission should continue, in its future work, to seek to maintain a balance between a global view of the development of international trade law, on the one hand, and the more concrete work of formulation of draft provisions, on the other.

39. General approval was expressed by representatives of the proposal for more concrete collaboration in the future between the Commission and other international bodies engaged in the work of unification of private law, such as the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law, and specifically of the proposal to set up a consultative group composed of representatives of the secretariats of those three bodies to promote such collaboration.

40. Representatives, stressing the importance to international trade and to their respective countries of an international régime on the carriage of goods by sea, welcomed the Conference of Plenipotentiaries, to be held at Hamburg, from 6 to 31 March 1978, to conclude, on the basis of the draft text elaborated by the Commission at its ninth session, a Convention on the Carriage of Goods by Sea and expressed optimism on the outcome of that Conference. Representatives also voiced their approval of the choice of venue for the Conference, and expressed their appreciation to the Government of the Federal Republic of Germany for its generosity in offering to act as host to the Conference.

41. With respect to the scheduling of the Conference, however, a number of representatives observed that it tended to overlap with the forthcoming session of the United Nations Conference on the Law of the Sea. Care had to be taken to avoid too tight a scheduling of legal conferences as there was a real danger of overtaxing the capacity of many States, especially developing countries, to be represented at such conferences.

I. Other business

42. Several representatives addressed the issue of the possible transfer of the International Trade Law Branch of the Office of Legal Affairs, the secretariat of the Commission, from New York to Vienna. It was said that reasons of efficiency, economy and the convenience of States, particularly developing countries, many of which did not have representation in Vienna, made it desirable for the work of the Commission to continue to be centred in New York. It was also to be hoped that adequate research and support facilities would be available for the secretariat should it be relocated, in order that it might maintain the high quality that had characterized its work. The view was also expressed in that connexion that it would be desirable to seek the opinion of the Commission on the issue.

DECISIONS

43. At its 47th meeting, the Sixth Committee adopted by consensus draft resolution A/C.6/32/L.8. At its 68th meeting, on 9 December, it adopted a draft decision. [For the text, see para. 45 below.]

RECOMMENDATIONS OF THE SIXTH COMMITTEE

44. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolution:

[Text not reproduced in this section. The draft resolution was adopted without change as General Assembly resolution 32/145. See section C below.]

45. The Sixth Committee recommends to the General Assembly the adoption of the following draft decision:

[Text not reproduced in this section. The draft decision was adopted without change as General Assembly decision 32/438. See section C below.]

C. General Assembly resolution 32/145 and General Assembly decision 32/438 of 16 December 1977

32/145. REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

The General Assembly,

Having considered the report of the United Nations Commission on International Trade Law on the work of its tenth session,¹

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law and defined the object and terms of reference of the Commission, its resolution 3108 (XXVIII) of 12 December 1973, by which it increased the membership of the Commission, and its resolution 31/99 of 15 December 1976, by which Governments of Member States not members of the Commission were entitled to attend as observers the sessions of the Commission and its Working Groups, as well as its previous resolutions concerning the reports of the Commission on the work of its annual sessions,

Recalling also its resolutions 3201 (S-VI) and 3202

(S-VI) of 1 May 1974, 3281 (XXIX) of 12 December 1974 and 3362 (S-VII) of 16 September 1975,

Reaffirming its conviction that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, would significantly contribute to universal economic co-operation among all States on a basis of equality and to the elimination of discrimination in international trade and, thereby, to the well-being of all peoples,

Having regard for the need to take into account the different social and legal systems in harmonizing the rules of international trade law,

Noting with appreciation that the United Nations Commission on International Trade Law has completed, or soon will complete, work on many of the priority items included in its programme of work,

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law on the work of its tenth session;

2. *Commends* the United Nations Commission on International Trade Law for the progress made in its

¹ Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17) (Yearbook . . . 1977, part one, II, A).

work and for its efforts to enhance the efficiency of its working methods;

3. *Notes with satisfaction* that the United Nations Commission on International Trade Law has completed work on a draft Convention on the International Sale of Goods² and that the Commission intends to place before the General Assembly, at its thirty-third session, draft provisions on the formation and validity of contracts for the international sale of goods, together with appropriate recommendations on the action to be taken with respect to those draft provisions;

4. *Notes with regret* that the second international symposium on international trade law could not be held owing to the insufficiency of voluntary contributions from Governments and other sources;

5. *Recommends* that the United Nations Commission on International Trade Law should:

(a) Continue its work on the topics included in its programme of work;

(b) Continue its work on training and assistance in the field of international trade law, taking into account the special interests of the developing countries;

(c) Maintain close collaboration with the United Nations Conference on Trade and Development and continue to collaborate with international organizations active in the field of international trade law;

(d) Continue to maintain liaison with the Commission on Transnational Corporations with regard to the consideration of legal problems that would be susceptible of action by the United Nations Commission on International Trade Law;

(e) Continue to give special consideration to the interests of developing countries and to bear in mind the special problems of land-locked countries;

(f) Keep its programme of work and working methods under review with the aim of further increasing the effectiveness of its work;

6. *Calls upon* the United Nations Commission on International Trade Law to continue to take account of the relevant provisions of the resolutions adopted by the General Assembly at its sixth and seventh special sessions that laid down the foundations of the new international economic order, bearing in mind the need for United Nations organs to participate in the implementation of those resolutions;

7. *Welcomes* the decision of the United Nations Commission on International Trade Law to review, in the near future, its long-term programme of work³ and, in this connexion, requests Governments to submit their views and suggestions on such a programme;

8. *Expresses the view* that both the draft Convention on the International Sale of Goods and the draft provisions on the formation and validity of contracts for the international sale of goods, referred to in paragraph

3 above, should be considered by a conference of plenipotentiaries at an appropriate time;

9. *Decides* to defer until its thirty-third session, when it shall have received from the United Nations Commission on International Trade Law the recommendations relating to the draft provisions on the formation and validity of contracts for the international sale of goods, a decision as to the appropriate time for convening the conference of plenipotentiaries mentioned in paragraph 8 above and as to the terms of reference of such a conference;

10. *Appeals* to all Governments and to organizations, institutions and individuals to consider making financial and other contributions that would make possible the holding of symposia on international trade law as envisaged by the United Nations Commission on International Trade Law;

11. *Requests* the Secretary-General to study the problem of how adequate financial resources can be provided for the symposia on international trade law which are organized biennially by the United Nations Commission on International Trade Law, taking into account the availability of voluntary contributions and the relevant recommendation of the Commission adopted at its 185th meeting on 17 June 1977,⁴ and to report to the General Assembly at its thirty-third session;

12. *Requests* the Secretary-General to forward to the United Nations Commission on International Trade Law the records of the discussions at the thirty-second session of the General Assembly on the Commission's report on the work of its tenth session.

105th plenary meeting

32/438. UNITED NATIONS CONFERENCE ON THE CARRIAGE OF GOODS BY SEA

At its 105th plenary meeting, on 16 December 1977, the General Assembly, on the understanding that it is for the United Nations Conference on the Carriage of Goods by Sea, to be held at Hamburg, Federal Republic of Germany, from 6 to 31 March 1978, to decide on the invitation and status of non-governmental organization-participants and in the hope that the Conference will give favourable consideration to the matter, on the recommendation of the Sixth Committee:⁵

(a) Took note of paragraph 58 of the report of the United Nations Commission on International Trade Law on the work of its tenth session;⁶

(b) Decided to request the Secretary-General to invite the organizations referred to in that paragraph.

² *Ibid.*, Thirty-second Session, Supplement No. 17 (A/32/17), chap. VI (Yearbook . . . 1977, part one, II, A).

³ *Ibid.*, Thirty-second Session, Annexes, agenda item 113, document A/32/402, para. 45 (reproduced in the present volume, part one, I, B).

⁴ *Ibid.*, Thirty-second Session, Supplement No. 17 (A/32/17) (Yearbook . . . 1977, part one, II, A).

² *Ibid.*, chap. II, sect. C.

³ *Ibid.*, Thirty-first Session, Supplement No. 17 (A/31/17), chap. VIII, sect. A (Yearbook . . . 1976, part one, II, A).

II. THE ELEVENTH SESSION (1978)

A. Report of the United Nations Commission on International Trade Law on the work of its eleventh session (New York, 30 May-16 June 1978) (A/33/17)*

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INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's eleventh session, held at New York from 30 May to 16 June 1978.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the General Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

CHAPTER I. ORGANIZATION OF THE SESSION

A. Opening

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its eleventh session on 30 May 1978. The session was opened on behalf of the Secretary-General by Mr. Erik Suy, the Legal Counsel.

B. Membership and attendance

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29

States, elected by the Assembly. By resolution 3108 (XXVIII), the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 12 December 1973 and 15 December 1976, are the following States:¹ Argentina,* Australia,** Austria,** Barbados,* Belgium,* Brazil,* Bulgaria,* Burundi,** Chile,** Colombia,** Cyprus,* Czechoslovakia,* Egypt,** Finland,** France,** Gabon,* German Democratic Republic,** Germany, Federal Republic of,* Ghana,** Greece,* Hungary,* India,* Indonesia,** Japan,** Kenya,* Mexico,* Nigeria,** Philippines,* Sierra Leone,* Singapore,** Syrian Arab Republic,* Union of Soviet Socialist Republics,** United Kingdom of Great Britain and Northern Ireland,** United Republic of Tanzania,** United States of America* and Zaire.*

* Term of office expires on the day before the opening of the regular annual session of the Commission in 1980.

** Term of office expires on the day before the opening of the regular annual session of the Commission in 1983.

¹ Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years, except that, in connexion with the initial election, the terms of 14 members, selected by the President of the Assembly, by drawing lots, expired at the end of three years (31 December 1970); the terms of the 15 other members expired at the end of six years (31 December 1973). Accord-

* Official Records of the General Assembly, Thirty-third Session, Supplement No. 17.

⁷ Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17), para. 27.

of such provisions at its ninth session, held at Geneva from 19 to 30 September 1977.⁸

14. At the present session the Commission had before it the following documents:

(a) A/CN.9/142 and Add. 1:⁹ Report of the Working Group on the International Sale of Goods on the work of its ninth session. The addendum reproduced the text of a draft Convention on the Formation of Contracts for the International Sale of Goods as approved by the Working Group.

(b) A/CN.9/143:⁹ Text of the draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods, prepared by the International Institute for the Unification of Private Law (UNIDROIT). This document was circulated by the Secretary-General at the request of the Working Group on the International Sale of Goods made at its ninth session.

(c) A/CN.9/144:⁹ Commentary on the draft Convention on the Formation of Contracts for the International Sale of Goods. This commentary was prepared and circulated by the Secretary-General in response to a request made by the Working Group on the International Sale of Goods at its ninth session.

(d) A/CN.9/145:⁹ Incorporation of the provisions of the draft Convention on the Formation of Contracts for the International Sale of Goods into the draft Convention on the International Sale of Goods: analysis of drafting problems. This document was prepared by the Secretariat upon a request made by the Working Group on the International Sale of Goods at its ninth session.

(e) A/CN.9/146 and Add. 1 to 4:⁹ Analytical compilation of comments by Governments and international organizations on the draft Convention on the Formation of Contracts for the International Sale of Goods and on the UNIDROIT draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods.

1. *Relationship of the draft Convention on the Formation of Contracts for the International Sale of Goods to the draft Convention on the International Sale of Goods*⁹

15. The Commission considered the question, which it had deferred at its tenth session, whether the rules on formation of contracts for the international sale of goods should be the subject-matter of a convention separate from the Convention on the International Sale of Goods.

16. A single consolidated text dealing with formation of contracts and containing substantive rules governing the obligations of the buyer and seller was supported on the basis that an integrated text would be more appropriate than two conventions because of the close relationship between the subject-matters of each draft convention. Furthermore, the existence of two separate conventions would inevitably lead to discrepancies between them as was illustrated by differences that already existed between the present draft texts and also by the differences that existed between the Convention on the Limitation Period in the International Sale of Goods and the present draft texts. A single text would also tend to encourage ratification of both the rules on formation and sales which would assist the harmonization and unification of international trade law.

17. Furthermore, although the existence of two separate conventions would enable States to ratify either the rules on formation or the rules on sale or both, the same result could be achieved by permitting separate ratification of those chapters in an integrated text which contains the rules on formation and sales. The benefits of a single text were generally considered to outweigh the problems that some States might encounter in implementing into their national law partial ratification of an entire text.

18. After discussion, the Commission decided to integrate the draft Convention on the Formation of Contracts with the draft Convention on the International Sale of Goods into a single text to be entitled "Draft Convention on Contracts for the International Sale of Goods".

2. *Duration of conference of plenipotentiaries to consider integrated text*¹⁰

19. The Commission was of the view that it would be difficult to finalize within four weeks an integrated Convention which contained approximately 80 substantive articles. There was a substantial body of opinion, based on experience in dealing with texts prepared by the Commission, that the adoption of a text of this length and complexity would require about six weeks. However, in deference to the view of several representatives that it would be difficult and costly for their countries to send delegations to a Conference of six weeks' duration, the Commission decided to recommend to the General Assembly that a conference of plenipotentiaries be convened for five weeks with the possibility of extending the Conference for a further week if such extension appeared necessary.

3. *Establishment of a Drafting Group*

20. The Commission, at its 201st meeting on 8 June 1978, established a Drafting Group composed of the representatives of Chile, Egypt, France, Hungary, India, Japan, Mexico, Nigeria, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland.

21. The Drafting Group was requested to integrate the draft Convention on Formation and the draft Convention on the International Sale of Goods into a single Convention. In doing so, the Drafting Group was requested to redraft the articles on sphere of application and general provisions as would be necessary for an integrated Convention. The Drafting Group was also requested to insert the rules on formation of contracts and the rules on sales in separate Parts of the Convention so that it would be possible to prepare a final clause which would permit a State to ratify or accept the

⁸ Reproduced in this volume, part two, I.

⁹ Report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977), A/CN.9/142 and Add. 1. The text of the provisions prepared by the Working Group is set out in the annex to the report (A/CN.9/142/Add.1).

⁹ The Commission considered this subject at its 197th meeting, on 6 June 1978; for the summary record of this meeting, see A/CN.9/SR.197.

¹⁰ The Commission considered this subject at its 197th meeting, on 6 June 1978; a summary record of this meeting is contained in A/CN.9/SR.197.

Convention either in respect of formation of contracts alone, in respect of sales alone or in respect of both.

22. In addition, the Drafting Group was requested to redraft articles of the draft Convention in accordance with the decisions taken by the Commission, to consider drafting suggestions made during the course of the Commission's discussions and, generally, to examine the text from the point of view of consistency of the terminology used and to ensure consistency between different language versions.

4. *Consideration of the report of the Drafting Group*¹¹

23. After considering the report of the Drafting Group, the Commission decided that article 7 of the draft Convention on Formation, which the Drafting Group had placed in the general provisions of the integrated draft Convention, should instead be included in part II of the draft Convention relating to the formation of the contract. The Commission also made a few drafting changes to various provisions. With these changes, the Commission adopted the text of the draft Convention on Contracts for the International Sale of Goods.

5. *Relationship of draft Convention with Prescription Convention*¹²

24. It was noted that the sphere of application provisions of the draft Convention differed in several respects from the equivalent provisions in the Convention on the Limitation Period in the International Sale of Goods. The Commission noted that, at the United Nations Conference on Prescription (Limitation) in the International Sale of Goods at which that Convention had been concluded, the possibility had been envisaged that, at such time as a revision of the Uniform Law on the International Sale of Goods was completed by the Commission, a protocol would be prepared to harmonize the sphere of application and general provisions of the two conventions.¹³

25. The Commission decided to recommend to the General Assembly that the conference of plenipotentiaries to be convened to conclude the Convention on Contracts for the International Sale of Goods be authorized to consider the desirability of adopting such a protocol. The Commission also requested the Secretary-General to prepare the draft of such a protocol for submission to the conference of plenipotentiaries.

6. *Summary of deliberations of the Commission on the draft Convention on the Formation of Contracts for the International Sale of Goods*

26. A summary of the Commission's deliberations is set forth in annex I below.

Decision of the Commission

27. At its 209th meeting on 16 June 1978, the Commission adopted unanimously the following decision:

The United Nations Commission on International Trade Law

1. Approves the text of the draft Convention on Contracts for the International Sale of Goods, as set forth below;

2. Requests the Secretary-General:

(a) To prepare, under his own authority, a commentary on the provisions of the draft Convention;

(b) To prepare draft provisions concerning implementation, reservations and other final clauses and, in particular, a provision which would allow a Contracting State to ratify or accept the Convention in respect of parts I and II or in respect of parts I and III or in respect of parts I, II and III;

(c) To circulate the draft Convention, together with the commentary and draft provisions concerning implementation, reservations and other final clauses, to Governments and interested international organizations for comments and proposals;

(d) To place before the conference of plenipotentiaries to be convened by the General Assembly the comments and proposals received from Governments and international organizations;

(e) To prepare an analytical compilation of such comments and proposals and to submit it to the conference of plenipotentiaries;

3. Recommends that the General Assembly should convene an international conference of plenipotentiaries, as early as practicable, to conclude, on the basis of the draft Convention approved by the Commission, a Convention on Contracts for the International Sale of Goods;

4. Further recommends that the General Assembly should authorize the conference of plenipotentiaries to consider the desirability of preparing a Protocol to the Convention on the Limitation Period in the International Sale of Goods, which would harmonize its provisions in respect of sphere of application with those in the Convention on Contracts for the International Sale of Goods as it may be adopted by the Conference.

B. *Text of the draft Convention on Contracts for the International Sale of Goods*

28. The draft Convention on Contracts for the International Sale of Goods reads as follows:

DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

PART I. SPHERE OF APPLICATION AND GENERAL PROVISIONS

Chapter I. Sphere of application

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) When the States are Contracting States; or

(b) When the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from

¹¹ The Commission considered this subject at its 207th and 208th meetings on 14 June 1978; summary records of these meetings are contained in A/CN.9/SR.207 and 208.

¹² The Commission considered this subject at its 208th meeting, on 14 June 1978; a summary record of this meeting is contained in A/CN.9/SR.208.

¹³ See generally the note by the Secretariat on the relationship of the draft Convention on the International Sale of Goods and the draft Convention on the Formation of Contracts for the International Sale of Goods to the Convention on the Limitation Period in the International Sale of Goods (A/CN.9/XI/CRP.2).

information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration.

Article 2

This Convention does not apply to sales:

- (a) Of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
- (b) By auction;
- (c) On execution or otherwise by authority of law;
- (d) Of stocks, shares, investment securities, negotiable instruments or money;
- (e) Of ships, vessels or aircraft;
- (f) Of electricity.

Article 3

(1) This Convention does not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided therein, this Convention is not concerned with:

- (a) The validity of the contract or of any of its provisions or of any usage;
- (b) The effect which the contract may have on the property in the goods sold.

Article 5

The parties may exclude the application of this Convention or, subject to article 11, derogate from or vary the effect of any of its provisions.

Chapter II. General provisions

Article 6

In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and the observance of good faith in international trade.

Article 7

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 8

(1) The parties are bound by any usage to which they have agreed

and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 9

For the purposes of this Convention:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) If a party does not have a place of business, reference is to be made to his habitual residence.

Article 10

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

Article 11

Any provision of article 10, article 27 or Part II of this Convention that allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this article.

PART II. FORMATION OF THE CONTRACT

Article 12

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Article 13

(1) An offer becomes effective when it reaches the offeree.

(2) An offer may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. It may be withdrawn even if it is irrevocable.

Article 14

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

- (a) If it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
- (b) If it was reasonable for the offeree to rely upon the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 15

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Article 16

(1) A statement made by or other conduct of the offeree indicating

assent to an offer is an acceptance. Silence shall not in itself amount to acceptance.

(2) Subject to paragraph (3) of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed provided that the act is performed within the period of time laid down in paragraph (2) of this article.

Article 17

(1) A reply to an offer which purports to be an acceptance containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without undue delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, *inter alia*, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially, unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror.

Article 18

(1) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of the period for acceptance at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

Article 19

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or dispatches a notice to that effect.

(2) If the letter or document containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree orally that he considers his offer as having lapsed or dispatches a notice to that effect.

Article 20

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 21

A contract is concluded at the moment when an acceptance of an

offer is effective in accordance with the provisions of this Convention.

Article 22

For the purposes of Part II of this Convention an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

PART III. SALES OF GOODS

Chapter I. General provisions

Article 23

A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such a result.

Article 24

A declaration of avoidance of the contract is effective only if made by notice to the other party.

Article 25

Unless otherwise expressly provided in Part III of this Convention, if any notice, request or other communication is given by a party in accordance with Part III and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

Article 26

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention.

Article 27

(1) A contract may be modified or abrogated by the mere agreement of the parties.

(2) A written contract which contains a provision requiring any modification or abrogation to be in writing may not be otherwise modified or abrogated. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Chapter II. Obligations of the seller

Article 28

The seller must deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and this Convention.

Section I. Delivery of the goods and handing over of documents

Article 29

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) If the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer;

(b) If, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at,

or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place;

(c) In other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 30

(1) If the seller is bound to hand the goods over to a carrier and if the goods are not clearly marked with an address or are not otherwise identified to the contract, the seller must send the buyer a notice of the consignment which specifies the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transportation which are appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must provide the buyer, at his request, with all available information necessary to enable him to effect such insurance.

Article 31

The seller must deliver the goods:

(a) If a date is fixed by or determinable from the contract, on that date; or

(b) If a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) In any other case, within a reasonable time after the conclusion of the contract.

Article 32

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract.

Section II. *Conformity of the goods and third party claims*

Article 33

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they:

(a) Are fit for the purposes for which goods of the same description would ordinarily be used;

(b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) Are contained or packaged in the manner usual for such goods.

(2) The seller is not liable under subparagraphs (a) to (d) of paragraph (1) of this article for any non-conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity.

Article 34

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and which is due to a breach of any of his obligations, including a breach of

any express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific period.

Article 35

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. The buyer retains any right to claim damages as provided for in this Convention.

Article 36

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redispach, examination may be deferred until after the goods have arrived at the new destination.

Article 37

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless such time-limit is inconsistent with a contractual period of guarantee.

Article 38

The seller is not entitled to rely on the provisions of articles 36 and 37 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 39

(1) The seller must deliver goods which are free from any right or claim of a third party, other than one based on industrial or intellectual property, unless the buyer agreed to take the goods subject to that right or claim.

(2) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right of claim.

Article 40

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial or intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that that right or claim is based on industrial or intellectual property:

(a) Under the law of the State where the goods will be resold or otherwise used if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) In any other case under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under paragraph (1) of this article does not extend to cases where:

(a) At the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) The right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

(3) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim.

Section III. Remedies for breach of contract by the seller

Article 41

(1) If the seller fails to perform any of his obligations under the contract and this Convention, the buyer may:

(a) Exercise the rights provided in articles 42 to 48;

(b) Claim damages as provided in articles 70 to 73.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Article 42

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with such requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice given under article 37 or within a reasonable time thereafter.

Article 43

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in the performance.

Article 44

(1) Unless the buyer has declared the contract avoided in accordance with article 45, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under paragraph (2) of this article, that the buyer make known his decision.

(4) A request or notice by the seller under paragraphs (2) and (3) of this article is not effective unless received by the buyer.

Article 45

(1) The buyer may declare the contract avoided:

(a) If the failure by the seller to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

(b) If the seller has not delivered the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of

article 43 or has declared that he will not deliver within the period so fixed.

(2) However, in cases where the seller has made delivery, the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time:

(a) In respect of late delivery, after he has become aware that delivery has been made; or

(b) In respect of any breach other than late delivery, after he knew or ought to have known of such breach, or after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 43, or after the seller has declared that he will not perform his obligations within such an additional period.

Article 46

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion as the value that the goods actually delivered would have had at the time of the conclusion of the contract bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 44 or if he is not allowed by the buyer to remedy that failure in accordance with that article, the buyer's declaration of reduction of the price is of no effect.

Article 47

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, the provisions of articles 42 to 46 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Article 48

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

Chapter III. Obligations of the buyer

Article 49

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Section I. Payment of the price

Article 50

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any relevant laws and regulations to enable payment to be made.

Article 51

If a contract has been validly concluded but does not state the price or expressly or impliedly make provision for the determination of the price of the goods, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.

Article 52

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

Article 53

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

- (a) At the seller's place of business; or
- (b) If the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in the place of business of the seller subsequent to the conclusion of the contract.

Article 54

(1) The buyer must pay the price when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

Article 55

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or other formality on the part of the seller.

Section II. *Taking delivery*

Article 56

The buyer's obligation to take delivery consists:

- (a) In doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
- (b) In taking over the goods.

Section III. *Remedies for breach of contract by the buyer.*

Article 57

(1) If the buyer fails to perform any of his obligations under the contract and this Convention, the seller may:

- (a) Exercise the rights provided in articles 58 to 61;
- (b) Claim damages as provided in articles 70 to 73.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

Article 58

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with such requirement.

Article 59

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in the performance.

Article 60

(1) The seller may declare the contract avoided:

(a) If the failure by the buyer to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

(b) If the buyer has not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 59, performed his obligation to pay the price or taken delivery of the goods, or if he has declared that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses his right to declare the contract avoided if he has not done so:

(a) In respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) In respect of any breach other than late performance, within a reasonable time after he knew or ought to have known of such breach, or within a reasonable time after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 59, or the declaration by the buyer that he will not perform his obligations within such an additional period.

Article 61

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with any requirement of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If the buyer fails to do so after receipt of such a communication, the specification made by the seller is binding.

Chapter IV. *Provisions common to the obligations of the seller and of the buyer*Section I. *Anticipatory breach and instalment contracts.*

Article 62

(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the ability to perform or in the creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract gives good grounds to conclude that the other party will not perform a substantial part of his obligations.

(2) If the seller has already dispatched the goods before the grounds described in paragraph (1) of this article become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice to the other party thereof and must continue with performance if the other party provides adequate assurance of his performance.

Article 63

If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided.

Article 64

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer, avoiding the contract in respect of any delivery, may, at the same time, declare the contract avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Section II. Exemptions

Article 65

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if he is exempt under paragraph (1) of this article and if the person whom he has engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect only for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Section III. Effects of avoidance

Article 66

(1) Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. Avoidance does not affect any provisions of the contract for the settlement of disputes or any other provisions of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract.

(2) If one party has performed the contract either wholly or in part, he may claim from the other party restitution of whatever he has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 67

(1) The buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) Paragraph (1) of this article does not apply:

(a) If the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which he received them is not due to an act or omission of the buyer; or

(b) If the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 36; or

(c) If the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered the lack of conformity or ought to have discovered it.

Article 68

The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 67 retains all other remedies.

Article 69

(1) If the seller is bound to refund the price, he must also pay interest thereon from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) If he must make restitution of the goods or part of them; or

(b) If it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

Section IV. Damages

Article 70

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 71

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction and any further damages recoverable under the provisions of article 70.

Article 72

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 71, recover the difference between the price fixed by the contract and the current price at the time he first had the right to declare the contract avoided and any further damages recoverable under the provisions of article 70.

(2) For the purposes of paragraph (1) of this article, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 73

The party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated.

Section V. Preservation of the goods

Article 74

If the buyer is in delay in taking delivery of the goods and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 75

(1) If the goods have been received by the buyer and he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his

disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination.

Article 76

The party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 77

(1) The party who is bound to preserve the goods in accordance with articles 74 or 75 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation, provided that notice of the intention to sell has been given to the other party.

(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party who is bound to preserve the goods in accordance with articles 74 or 75 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) The party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

Chapter V. Passing of risk

Article 78

Loss or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 79

(1) If the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular destination, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. If the seller is required to hand the goods over to a carrier at a particular place other than the destination, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of risk.

(2) Nevertheless, if the goods are not clearly marked with an address or otherwise identified to the contract, the risk does not pass to the buyer until the seller sends the buyer a notice of the consignment which specifies the goods.

Article 80

The risk in respect of goods sold in transit is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents controlling their disposition. However, if at the time of the conclusion of the contract the seller knew or ought to have known that the goods had been lost or damaged and he has not disclosed such fact to the buyer, such loss or damage is at the risk of the seller.

Article 81

(1) In cases not covered by articles 79 and 80 the risk passes to the buyer when the goods are taken over by him or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) If, however, the buyer is required to take over the goods at a place other than any place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to a sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer until they have been clearly identified to the contract.

Article 82

If the seller has committed a fundamental breach of contract, the provisions of articles 79, 80 and 81 do not impair the remedies available to the buyer on account of such breach.

Article (X)

A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may at the time of signature, ratification or accession make a declaration in accordance with article 11 that any provision of article 10, article 27, or Part II of this Convention, which allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing shall not apply where any party has his place of business in a Contracting State which has made such a declaration.

CHAPTER III. INTERNATIONAL PAYMENTS

Negotiable instruments

29. The Commission had before it two reports of the Working Group on International Negotiable Instruments: the report on the work of the Working Group's fifth session, held in New York from 18 to 29 July 1977 (A/CN.9/141),* and the report on the work of its sixth session (A/CN.9/147),* held at Geneva from 3 to 13 January 1978. These reports set forth the progress so far made by the Working Group in its work on the preparation of a draft convention on international bills of exchange and international promissory notes. The proposed convention would establish uniform rules applicable to an international negotiable instrument (bill of exchange or promissory note) for optional use in international payments.

Report of the Working Group (fifth session)

30. As indicated in its report, the Working Group at its fifth session began consideration of the revised text of the draft uniform law on international bills of exchange and international promissory notes, prepared by the Secretariat on the basis of the deliberations and decisions of the Working Group at its four previous sessions relative to the draft uniform law first prepared by the Secretary-General in response to a decision of the Commission¹⁴ and referred by the Commission to the Working Group.¹⁵ The report indicates that the Working Group at this session completed consideration of articles 1 to 23 and commenced consideration of article 24.

31. The report on the work of its fifth session sets forth the deliberations and conclusions of the Working Group with respect to the provision of the draft uniform law regarding sphere of application of the rules, formal requirements of an international negotiable instrument, completion of an incomplete instrument, interpretation, transfer of an instrument and the rights of a holder.

* Reproduced in this volume, part two, II.

¹⁴ *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417)*, para. 35 (Yearbook . . . 1971, part one, II, A). The text of the draft uniform law, with commentary, appears in A/CN.9/WG.IV/WP.2.

¹⁵ *Ibid.*, *Twenty-seventh Session, Supplement No. 17 (A/8717)*, para. 61 (Yearbook . . . 1972, part one, II, A).

32. The report also contains a recommendation by the Working Group to the Commission that the uniform provisions governing international bills of exchange and international promissory notes should be set forth in the form of a convention rather than in the form of a uniform law and should then be retitled, "Draft Convention on International Bills of Exchange and International Promissory Notes".

Report of the Working Group (sixth session)

33. As indicated in its report, the Working Group at its sixth session continued its consideration of the revised text of the draft uniform law prepared by the Secretariat and considered articles 5 and 6 and articles 24 to 53. The report sets forth the deliberations and conclusions of the Working Group with respect to the provisions of the draft uniform law regarding the definition of a "protected holder", the rights of a holder and a protected holder, the liability of the parties, presentment for acceptance and presentment for payment.

34. The report also sets forth a decision by the Working Group to establish a drafting group composed of representatives of the four working languages of the Commission (English, French, Russian and Spanish) to review the text of the draft Convention on International Bills of Exchange and International Promissory Notes as finally adopted by the Working Group to assure harmony between the various language versions.

Consideration of the reports by the Commission¹⁶

35. The Commission, in accordance with its general policy of considering the substance of the work carried out by its working groups only upon completion of that work, took note of the reports of the Working Group on International Negotiable Instruments.

Decision of the Commission

36. The Commission adopted the following decision:
The United Nations Commission on International Trade Law

1. *Takes note with appreciation* of the reports of the Working Group on International Negotiable Instruments on the work of its fifth and sixth sessions;

2. *Requests* the Working Group to continue its work under the terms of reference set forth by the United Nations Commission on International Trade Law in the decision adopted in respect of negotiable instruments at its fifth session and to complete that work expeditiously;

3. *Requests* the Secretary-General to carry out, in accordance with the directives of the Working Group on International Negotiable Instruments, further work in connexion with the draft uniform law on international bills of exchange and with the inquiries regarding the use of cheques for settling international payments, in consultation with the Commission's Study Group on International Payments, composed of experts provided by interested international organizations and banking and trade institutions, and for these purposes to convene meetings as required.

¹⁶ The Commission considered this item at its 203rd meeting on 12 June 1978; a summary record of this meeting is contained in A/CN.9/SR.203.

CHAPTER IV. PROGRAMME OF WORK OF THE COMMISSION

37. At its ninth session, the Commission noted that it had completed, or would soon complete, work on many of the priority items included in its programme of work and that it was therefore desirable to review in the near future its long-term work programme. In this connexion, the Secretariat was instructed by the Commission to submit to its eleventh session a report on the long-term work programme of the Commission and, where appropriate, to consult with international organizations and trade institutions as to its contents.¹⁷

38. At its thirty-first session, the General Assembly welcomed the decision of the Commission to review its long-term work programme, and requested the Secretary-General to ask Governments to submit their views and suggestions on such a programme (General Assembly resolution 31/99 of 15 December 1976).

39. At the present session, the Commission had before it the following documents:

(a) Report of the Secretary-General on the programme of work of the Commission. This contained an account of the extent to which the first programme of work of the Commission had been completed, an analysis of proposals by Governments and international organizations on the future work programme of the Commission, and a discussion of issues relating to the establishment of a new programme of work (A/CN.9/149 and Corr. 1 and 2).*

(b) Note by the Secretariat on liquidated damages and penalty clauses (A/CN.9/149/Add.1).*

(c) Note by the Secretariat on international barter or exchange (A/CN.9/149/Add.2).*

(d) Note by the Secretariat on some legal aspects of electronic funds transfer (A/CN.9/149/Add.3).*

(e) Note by the Secretariat setting forth a proposal by France relating to the determination of a unit of account for inclusion in the programme of work of the Commission (A/CN.9/156).*

(f) Note by the Secretariat on co-ordination of work between the Commission and other international organizations (A/CN.9/154).

(g) Note by the Secretary-General setting forth the recommendations of the Asian-African Legal Consultative Committee on the programme of work of the Commission (A/CN.9/155).*

40. The Commission considered the following issues:¹⁸

(a) The possible contents of a new work programme;

(b) The allocation of subjects to working groups of the Commission;

(c) The co-ordination of the work of organizations engaged in the unification of international trade law.

A. The possible contents of a new work programme

41. In its deliberations on this issue, the Commission used as a basis the following "List of subject-

* Reproduced in this volume, part two, IV.

¹⁷ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*, paras. 65-66 (Yearbook . . . 1976, part one, II, A).

¹⁸ The Commission considered this item at its 203rd and 204th meetings, on 12 June 1978, at its 205th and 206th meetings, on 13 June 1978, and at its 208th meeting, on 14 June 1978; summary records of these meetings are contained in A/CN.9/SR.203 to 206 and 208.

matters for possible inclusion in the future work programme" set forth in document A/CN.9/149 and Corr.1:

List of subject-matters for possible inclusion in the future work programme¹⁹

I. Issues relating to international trade law

(a) Preparation of a code of international trade law (FP, NP).

(b) Preparation of uniform conflict of law rules (NP).

(c) Work directed to the unification of international contracts.

(i) Contracts of warehousing (NP);

(ii) Contracts of barter (NP);

(iii) Contracts for the supply of labour, or contracts where the party who orders the goods supplies a substantial part of the materials (NP);

(iv) General conditions on the erection and technical servicing of machines and industrial plant (NP);

(v) Contracts of leasing (NP);

(vi) Standard contract terms (FP, NP);

(vii) Consequences of frustration (FP);

(viii) *Force majeure* clauses (FP, NP);

(ix) Penalty clauses (NP);

(x) Certain contractual issues of general application (e.g. set-off, suretyship assignment, transfer of property rights, formation of contracts in general, representation and full powers, frustration, damages, application of usages) (NP);

(xi) Contracts for quality control (NP);

(xii) Public tenders (NP).

(d) Preparation of uniform rules relating to international payments.

(i) Electronic funds transfers (NP);

(ii) "Standby" letters of credit (NP);

(iii) Clauses protecting parties against fluctuations in the value of currency (NP);

(iv) Collection of commercial paper (NP).

(e) International commercial arbitration

(i) Study of means to make the UNCITRAL Arbitration Rules more effective (NP);

(ii) Formulation of provisions for situations which cannot be dealt with by bilateral agreements (NP);

(iii) Proposal relating to article V (1) (e) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NP).

(f) Transport²⁰ and transport insurance

(i) Drafting a convention on multimodal transport (NP);

(ii) Consideration of the law of charter parties (NP);

(iii) Consideration of legal issues relating to transport by container (NP);

(iv) Consideration of the law of transport insurance (NP);

(v) Preparation of uniform rules relating to contracts for the forwarding of goods (NP).

(g) Agency

Legal issues arising out of agency contracts concluded for commercial purposes (FP, NP).

(h) Insurance (FP, NP).

(i) Products liability (FP, NP).

(j) Company law

The establishment and operation of commercial companies (NP).

(k) Intellectual property (FP).²¹

(l) Legalization of documents (FP).²²

II. Issues arising from a possible reordering of international economic relations

(a) Legal implications of the new international economic order (NP).

(b) Multinational enterprises (FP, NP).

(c) Transfer of technology (NP).

(d) Elimination of discrimination in laws affecting international trade (FP, NP).

42. In the course of the deliberations, it was suggested that the following topics be added to this list:

(a) "Hardship" clauses;

(b) Restrictive business practices;

(c) Factoring contracts;

(d) A convention on the recognition and enforcement of judgements in commercial matters;

(e) A convention regulating the use of microfilms in arbitration proceedings;

(f) Letters of intent;

(g) The legal effect of initialling a commercial contract;

(h) Conciliation of international trade disputes, and its relationship to arbitration;

(i) Validity of contracts of international sale of goods.

43. There was wide agreement that the success of the first work programme had been in large measure due to the fact that work had been directed to specific identified topics. The new work programme should also be composed of topics of this character. Furthermore, the topics selected should be of global significance. Topics, the unification of which had merely limited

¹⁹ In the list that follows, the letters "FP" indicate that the topic was formerly proposed for inclusion in the programme of work of the Commission, either at its first session or at a subsequent time. The letters "NP" indicate that the topic is a new proposal made for the purposes of deciding on a new programme of work. It will be noted that, in several instances, former proposals have been repeated. The list does not include priority topics in respect of which work has not yet been completed.

²⁰ It was proposed at the first session of the Commission that "transportation" be placed on the work programme of the Commission.

²¹ The Convention establishing the World Intellectual Property Organization (WIPO), Stockholm, 1967, states that the objectives of that organization are, *inter alia*, to promote the protection of intellectual property throughout the world through co-operation among States, and, where appropriate, in collaboration with any other international organization. WIPO became a specialized agency of the United Nations in December 1974.

²² The Convention abolishing the requirement of legalization for foreign public documents, The Hague, 5 October 1961, has been concluded under the auspices of the Hague Conference on Private International Law.

interest, should be left for consideration by other bodies. It was also noted that, in accordance with General Assembly resolution 2205 (XXI) of 17 December 1966, establishing the mandate of the Commission, an attempt should be made to identify topics of special interest to developing countries.

44. In the course of the deliberations, several topics were mentioned for possible inclusion in the work programme, as set forth in the following paragraphs.

1. *Preparation of a code of international trade law*

45. In support of the inclusion of this topic, it was noted that the current method of unifying special areas of trade law might eventually produce lack of harmony between the various instruments both because the instruments might contain conflicting rules, and because the same problems might be resolved differently in different instruments. Further, there would remain some areas where divergent national laws would apply. The prevailing view, however, was that it was inadvisable for the Commission to undertake such a project at the present time. Such a project would take many years to complete, and there was a risk that the rules codified would be obsolete at the time of completion.

2. *Preparation of uniform conflict of law rules*

46. The view was expressed that, concurrently with its work on the unification of substantive rules of law, the Commission could, where appropriate, also direct its attention to the preparation of uniform conflict of law rules to resolve conflict of law issues arising out of international trade transactions. In this connexion, it was noted that the Commission could examine the 1955 Hague Convention on the Law Applicable to International Sales of Goods, which was a topic on the existing work programme of the Commission. The observer for the Hague Conference on Private International Law stated that the Conference had on its work programme the drafting of a Protocol to the 1955 Hague Convention. The general view within the Commission was that it could consider the appropriateness of undertaking work on uniform conflict of law rules.

3. *Topics relating to international trade contracts*

47. Wide support was expressed for the inclusion in the new programme of work of the following topics relating to international trade contracts: "hardship" clauses, *force majeure* clauses, liquidated damages and penalty clauses and clauses protecting parties against fluctuations in the value of currency. It was noted that the formulation of model clauses in these areas would facilitate international trade. It was also suggested that an investigatory study be made by the Secretariat on contract practices in international trade, which would focus on typical clauses used in international contracts, and on the use of unfair clauses in trade between developed and developing countries.

48. There was general agreement that the subject of international barter or exchange might be of special interest to developing countries. There was wide support for the inclusion of this item in the programme of work.

4. *Topics relating to international payments*

49. Considerable support was expressed for the

proposal (A/CN.9/156)* to commence work on determining a universal unit of value which could serve as a point of reference in international conventions. Support was also expressed for commencing work, in collaboration with the International Chamber of Commerce, on uniform rules relating to standby letters of credit. In regard to the subject of legal problems of electronic funds transfers, there was support for its inclusion in the work programme, but with the subject given a lower priority than the other two subjects mentioned above in this paragraph.

5. *Topics relating to international transport*

50. There was some support for including in the new work programme the following items: preparation of a draft Convention on multimodal transport, preparation of uniform rules on contracts for the forwarding of goods and legal issues relating to charter-parties, transport by container and transport insurance.

51. In relation to the preparation of a draft Convention on multimodal transport, the view was expressed that all previous efforts by international bodies at unifying the law on multimodal transport had met with little success. No body dealing with a single mode of transport, such as the International Civil Aviation Organization (ICAO) dealing with air transport, and the Intergovernmental Maritime Consultative Organization (IMCO) dealing with sea transport, was competent to deal with the issue. A draft Convention on the Combined Transport of Goods (TCM Convention), approved in 1969 by the International Maritime Committee (CMI), had not been submitted to a diplomatic conference. A subsequent draft prepared by UNIDROIT had also not been submitted to a diplomatic conference. A joint meeting of IMCO and the Economic Commission for Europe (ECE) had also produced a draft TCM Convention, but this had also not commanded sufficient support. The International Chamber of Commerce (ICC) had prepared Uniform Rules for a Combined Transport Document (ICC Brochure No. 298), but these rules had been criticized. An Intergovernmental Preparatory Group, established by the Trade and Development Board in 1973, was currently considering the formulation of a draft Convention, but had made little progress in drafting a legal text. In the light of the successful elaboration by the Commission of the draft Convention on the Carriage of Goods by Sea, which had formed the basis for the United Nations Convention on the Carriage of Goods by Sea, 1978, it was proposed that the Commission should offer to collaborate with the UNCTAD Intergovernmental Preparatory Group in formulating a draft Convention on multimodal transport.

52. Doubts were expressed as to whether it was proper at the present time to include in the work programme of the Commission the items on multimodal transport, charter-parties, container transport and marine insurance, as these were currently under consideration by subsidiary organs of the Trade and Development Board. To commence work without further consultation with these organs might create duplication of work.

6. *International commercial arbitration*

53. A suggestion was made that the Commission

* Reproduced in this volume, part two, IV, C.

include in its work programme the conciliation of disputes arising out of international trade transactions, and the relation of such conciliation procedures to arbitration. It was noted that conciliation had been adopted as a method of dispute settlement in some recent inter-regional trade agreements. This was also known in the Asian-African region. There was wide support for this suggestion.

7. *Product liability*

54. In relation to this topic, attention was drawn to the decision of the Commission at its tenth session (1977) not to pursue work on this subject, but that the matter should be reviewed in the context of the future work programme of the Commission if one or more member States of the Commission should take an initiative to that effect. There was support for the inclusion of this topic in the new work programme on the basis that such work would be of particular interest to the developing countries.

8. *Legal implications of the new international economic order*

55. There was wide support for inclusion by the Commission in its work programme of the legal issues of the new international economic order. It was noted that the General Assembly, by its resolutions 3494 (XXX) of 15 December 1975, 31/99 of 15 December 1976 and 32/145 of 16 December 1977, had called upon the Commission to take account in its work of the relevant provisions of the resolutions of the sixth and seventh special sessions of the Assembly that laid down the foundations of the new international economic order, bearing in mind the need for United Nations organs to participate in the implementation of these resolutions. It was stated that the implementation of the new international economic order was of greatest importance to the economic development of the developing countries, and this had prompted the resolution of the Asian-African Legal Consultative Committee, calling upon the Commission to examine this topic (A/CN.9/155).^{*} At the time of the establishment of the Commission, the principles of the new international economic order had not been formulated and, accordingly, no mention was made in the mandate of the Assembly to the Commission contained in Assembly resolution 2205 (XXI) of 17 December 1966. The above-mentioned Assembly resolutions 3494 (XXX), 31/99 and 32/145, adopted after the formulation of these principles, should be construed as extending the original mandate of the Commission.

56. In opposition it was stated that the present topic was not clearly defined. Further, it was possible that the new international economic order was still in the course of evolution, and it would be inappropriate to study its legal implications at the present stage. The focus of the Commission's work hitherto had been on subjects with little political content, thus enabling the Commission to accomplish its tasks in a spirit of harmony. The suggested topic, however, might lead to polemical debate and impede the smooth functioning of the Commission.

57. In reply, it was stated that the course of action proposed was for the Secretariat to prepare preliminary studies identifying specific legal issues which the Com-

mission might consider. These issues would then be submitted to a special committee composed of government representatives, who could further clarify the issues if necessary. Furthermore, the work of the special committee itself would be reviewed by the Commission. There was therefore no reason to fear that the work of the Commission would not proceed with its usual effectiveness.

58. The view was also expressed that General Assembly resolutions 3494 (XXX), 31/99 and 32/145 obliged the Commission not to consider the legal implications of the new international economic order in general, but to take that order into account in selecting items for its programme of work, and in the way in which issues relating to selected items were resolved.

9. *Other subjects*

59. In the course of the deliberations, the following were suggested as other subjects which might be examined by the Commission: multinational enterprises, the transfer of technology, restrictive business practices, the elimination of discrimination in trade, the principle of mutual and equitable benefit in trade and the duty to co-operation in trade relations.

B. *Allocation of subjects to working groups of the Commission*

60. It was noted that, owing to financial constraints, the Commission could only establish three working groups. The former Working Group on International Legislation on Shipping had been dissolved, and a new working group could be established in its place. The Working Group on the International Sale of Goods had completed its mandate and could be given a new mandate. Since the Working Group on International Negotiable Instruments had yet to complete its work, it was not imperative to allocate any new items to it at the present stage.

61. It was noted that many suggested topics relating to international contracts could be entrusted to the existing Working Group on the International Sale of Goods, with a corresponding modification in its title. Further, topics relating to international payments might be entrusted to the Working Group on International Negotiable Instruments. There was wide support for entrusting to a third working group the work on the legal implications of the new international economic order. There was general agreement that the work on arbitration could proceed, as in the past, without recourse to a working group.

C. *Co-ordination of the work of organizations engaged in the unification of international trade law*

62. There was general agreement on the need for effective co-ordination of the work of organizations engaged in the unification of international trade law. It was recalled that General Assembly resolution 2205 (XXI) of 17 December 1966 establishing the Commission imposed on it a duty to co-ordinate such work, not only in regard to the work of the Commission in relation to the work of other organizations, but in relation to the work of other organizations *inter se*. Such co-ordination was of special importance in relation to the new programme of work for, whereas other organizations had not been dealing with the priority items

^{*} Reproduced in this volume, part two, IV, B.

selected for the first work programme of the Commission, several organizations were already dealing with certain aspects of items which might be included in the new work programme.

63. The view was expressed that the Commission, a body having a universal character, had a special position in the field of unification, and that therefore the need to co-ordinate work did not prevent the Commission from commencing work on an item already undertaken by a body having a less representative character.

64. It was noted that there was a need to co-ordinate the work of the Commission not only with organizations outside the United Nations family, but also with organizations within it. Consultation already existed between the secretariats of the Commission and of certain organizations for the purpose of co-ordinating work programmes, and it was agreed that such links should be maintained and strengthened.

65. In the discussion of means to improve co-ordination, it was observed that the Commission worked within certain limitations, as it had no power to oblige another organization to take up an item of work, or cease to deal with an item. The most effective check on duplication of work could be exercised by States members of international organizations themselves, for they could allocate particular subjects to the organizations most fitted to deal with them. The following suggestions as to machinery for more effective co-ordination were made:

(a) Recognizing that co-ordination was primarily the work of the secretariat of the Commission, it was suggested that initiatives should be taken to approach the secretariats of other organizations whose programmes of work appeared to overlap with that of the Commission. Such an initiative might take the form of a special intersecretariat meeting to eliminate duplication of work and promote collaboration.

(b) A co-ordinating committee might be created of members of the Commission entrusted with the duty of furthering co-ordination by the best available means.

(c) A steering committee might be created of members of bodies engaged in the unification of international trade law to co-ordinate work.

D. *Recommendations of the ad hoc working group and decisions of the Commission*

1. *Creation of an ad hoc working group to consider the programme of work*

66. At the conclusion of its deliberations on a programme of work, the Commission established an *ad hoc* working group composed of the representatives of Chile, Colombia, Egypt, France, the German Democratic Republic, the Federal Republic of Germany, Hungary, India, Japan, Kenya, Mexico, Nigeria, Singapore, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America. The Working Group elected as its Chairman Prof. J. Barrera Graf (Mexico). The Commission requested the Working Group:

(a) To consider the items proposed for inclusion in the new work programme, and to make its recommendations thereon;

(b) To make recommendations as to working methods which might be adopted by the Commission.

2. *Recommendations of the ad hoc Working Group*

67. The *ad hoc* Working Group made the following recommendations to the Commission:

New work programme of the Commission

(a) The Commission should take note of all items in the "List of subject-matters for possible inclusion in the future work programme" (see para. 41 above), and the items listed at paragraph 42 above, as possible subjects for inclusion in its work programme.

(b) As a general rule, the Commission should not refer subject-matters to a Working Group until after preparatory studies had been made by the Secretariat and the consideration of these studies by the Commission had indicated not only that the subject-matter was a suitable one in the context of the unification and harmonization of a law, but that the preparatory work was sufficiently advanced for a working group to commence work in a profitable manner.

(c) Priority should be accorded to the following:

(i) *Topics relating to international trade contracts*

- a. International barter or exchange;
- b. Study of international contract practices, with special reference to "hardship" clauses, *force majeure* clauses, liquidated damages and penalty clauses, and clauses protecting parties against currency fluctuations;
- c. The 1955 Hague Convention on the Law Applicable to International Sales, to be considered by the Commission only after the Hague Conference on Private International Law had completed its revision of that Convention.

(ii) *Topics on international payments*

- a. Stand-by letters of credit, to be studied in conjunction with the International Chamber of Commerce;
- b. Electronic funds transfer, to be given, however, a lower priority than item (a).

(iii) *Determination of a universal unit of account for international conventions*

(iv) *International commercial arbitration*

Conciliation of international trade disputes and its relation to arbitration and to the UNCITRAL Arbitration Rules.

(v) *Product liability*

(vi) *The legal implications of the new international economic order*

(vii) *Transportation*

The preparation of studies setting forth the work so far accomplished by international organizations in the fields of multimodal transport, charter-parties, marine insurance, transport by container and the forwarding of goods.

(d) In respect of all the above topics, the Secretariat should, in the first instance, undertake preliminary studies, where necessary in consultation with interested international organizations. The Secretariat could exercise its discretion in determining the order in which such studies were prepared, but take into account any priorities indicated by the Commission.

(e) The Commission should decide on the scope of

further work on these subjects, and their possible allocation to Working Groups, after having examined the studies prepared by the Secretariat.

68. The Commission considered and adopted these recommendations.

Decision of the Commission

69. At its 208th meeting, on 14 June 1978, the Commission adopted the following decision:

The United Nations Commission on International Trade Law,

Noting the desirability of establishing a new programme of work,

Having considered the views of Governments and international organizations submitted to it as to the possible contents of a new programme of work,

1. *Takes note* of all items in the list of subject-matters for possible inclusion in the future work programme set forth in paragraph 41 above, and the items set forth in paragraph 42 above as possible subjects for inclusion in its work programme;

2. *Decides* that priority be given to the consideration of the items set forth in paragraph 67 above;

3. *Requests* the Secretary-General to co-ordinate the programme of work of the Commission with that of other organizations working in the same areas and, to the extent considered appropriate, to collaborate with such other organizations;

4. *Further requests* the Secretary-General to submit to the Commission at its twelfth session studies on priority items selected from the programme of work.

3. *New international economic order*

70. A proposal for a decision in respect of the action to be taken by the Commission in respect of the new international economic order was submitted by the representatives of Egypt, Ghana, India, Kenya, Nigeria, the Philippines, Singapore and the United Republic of Tanzania, and the observer for Yugoslavia. After certain amendments had been made, and after discussion, during which some delegations took the view that it was premature to establish a working group at this session, the Commission, at its 208th plenary meeting on 14 June 1978, adopted the decision set forth in paragraph 71 below.

Decision of the Commission

71. At its 208th meeting, on 14 June 1978, the Commission adopted the following decision:

The United Nations Commission on International Trade Law,

Having regard to General Assembly resolution 2205 (XXI) of 17 December 1966 establishing the United Nations Commission on International Trade Law for the purpose of promoting the progressive harmonization and unification of the law of international trade,

Noting that the General Assembly, in that resolution, requested the Commission to bear in mind the interests of all peoples, and particularly those of de-

veloping countries, in the extensive development of international trade,

Taking note of General Assembly resolutions 3494 (XXX) of 15 December 1975, 31/99 of 15 December 1976 and 32/145 of 16 December 1977, in which it called on the Commission to take account of the relevant provisions of the resolutions of the sixth and seventh special sessions of the Assembly that laid down the foundations of the new international economic order, bearing in mind the need for United Nations organs to participate in the implementation of those resolutions,

Taking note of the resolution on the future programme of work of the Commission, adopted by the Asian-African Legal Consultative Committee at its nineteenth session, held at Doha, Qatar, in January 1978,²³

1. *Expresses the view* that, in order to implement the mandate given to it by the General Assembly in the above resolutions, it is necessary for the United Nations Commission on International Trade Law to determine the legal implications of the new international economic order;

2. *Requests* the Secretary-General:

(a) To place before the United Nations Commission on International Trade Law, at its twelfth session in 1979, a report setting forth subject-matters that are relevant in the context of the development of a new international economic order and that would be suitable for consideration by the Commission, accompanied, where appropriate, with background reports and recommendations as to the action that could be taken by the Commission;

(b) To consult, where appropriate, with other international organizations and bodies, within and outside the United Nations system, on their programme of work to the extent that such programmes relate to legal work carried out by them in the field of international trade law and are especially relevant to the new international economic order, and to formulate, for the Commission's consideration, recommendations as to the degree of co-ordination that would be required for a rational programme of work in the area at issue;

(c) To invite Governments to submit their views and proposals as to subject-matters that are relevant in the context of the development of a new international economic order and that would be suitable for consideration by the Commission;

(d) To carry out the preparatory work, where appropriate with the assistance of an *ad hoc* study group composed of representatives of interested organizations and individual experts;

3. *Decides* to establish a Working Group on the New International Economic Order to examine the report of the Secretary-General in order to make recommendations as to specific topics which could appropriately form part of the programme of work of the Commission, but to defer the designation of States members of the Working Group until its twelfth session, pending the submission of the report of the Secretary-General mentioned in paragraph 2 (a) above;

²³ A/CN.9/155 (reproduced in the present volume, part two, IV, B).

4. *Requests* the Secretary of the Commission, in accordance with his normal practice of informing interested intergovernmental organizations of the progress of the work of the Commission and of collaborating with such organizations, to inform the Asian-African Legal Consultative Committee of the action taken by the Commission and to maintain close collaboration with that organization.

CHAPTER V. TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW ²⁴

72. The Commission had before it a note by the Secretary-General (A/CN.9/152) setting forth the actions taken by the Secretariat to implement the Commission's decisions on training and assistance in the field of international trade law adopted at its tenth session,²⁵ as well as the actions of the Sixth Committee and the General Assembly relating thereto.

A. *Second UNCITRAL symposium*

73. At its tenth session, consequent upon the cancellation for lack of funds of the UNCITRAL symposium on international trade law planned in connexion with that session, the Commission recommended to the General Assembly that the Assembly "should consider the possibility of providing for the funding of the Commission's symposia on international trade law, in whole or in part, out of the regular budget of the United Nations".²⁶ The Commission was informed by the Secretariat of the action taken by the Sixth Committee and by the Assembly at its thirty-second session with respect to the Commission's recommendation.

74. It was reported that, in response to the Commission's recommendation, the General Assembly, on the recommendation of the Sixth Committee, had, at its thirty-second session, adopted resolution 32/145 of 16 December 1977, by which it requested the Secretary-General "to study the problem of how adequate financial resources can be provided for the symposia on international trade law which are organized biennially by the United Nations Commission on International Trade Law taking into account the availability of voluntary contributions and the relevant recommendation of the Commission adopted at its 185th meeting on 17 June 1977,²⁷ and to report to the General Assembly at its thirty-third session".

75. The Commission took note of the General Assembly's action and reiterated its belief that the UNCITRAL symposia on international trade law constitute a very valuable and important aspect of the Commission's work which it would be desirable to continue if funds could be found for the purpose.

76. The question was raised whether it would be useful for the Commission to renew at the present session its recommendation regarding the financing of the UNCITRAL symposia. It was, however, agreed that, since the matter was already before the General Assem-

bly for a decision, no further action by the Commission was necessary or desirable pending such decision. The suggestion was also made that a programme, such as a seminar, for the training of young lawyers from developing countries in the field of international trade law might be a more useful and less costly alternative to the symposia.

77. The Commission also considered the question of rescheduling the second symposium assuming that funds became available in the future. There was considerable support for holding the symposium as soon as practicable thereafter, in view especially of the fact that it had originally been scheduled for the Commission's tenth session in 1977. After considering a number of proposals for a specific date, the Commission concluded that there were at present still too many indeterminate factors to enable it to decide the time when the symposium might most practicably be organized. It was noted that quite apart from the uncertainty as to funds, there were the following other factors to consider: the minimum period of six-to-nine months that would be required, after funds became available, for the administrative aspects of organizing the symposium; the continued preference expressed by representatives for holding the symposium contemporaneously with a session of the Commission; and the probability of a conference of plenipotentiaries in 1980 to consider the draft Convention on Contracts for the International Sale of Goods.

78. The Commission, therefore, decided to leave it to the Secretariat to propose a suitable date to the Commission for the holding of the second symposium on international trade law as soon as the prospects for the symposium became clearer.

79. The representative of the Federal Republic of Germany, in his intervention, stressed the importance which his Government attached to the Commission's training and assistance programme, and particularly to the UNCITRAL symposia, and announced that Government's readiness to make a voluntary contribution towards organizing the second UNCITRAL symposium, provided that other States would make similar contributions.

B. *Fellowships and internship arrangements for training in international trade law*

80. The Commission took note with appreciation of the information contained in the note by the Secretary-General (A/CN.9/152) that the Government of Belgium had informed the Secretary-General that it would again award, in 1978, two fellowships for academic and practical training in international trade law which it had offered for the past few years to candidates from developing countries.

CHAPTER VI. FUTURE WORK AND OTHER BUSINESS²⁸

A. *Date and place of the Commission's twelfth session*

81. The representative of Austria, on behalf of his Government, invited the Commission to hold its twelfth

²⁴ The Commission considered this item at its 203rd meeting on 12 June 1978; a summary of this meeting is contained in A/CN.9/SR.203.

²⁵ *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17)*, para. 45 (Yearbook . . . 1977, part one, II, A).

²⁶ *Ibid.*

²⁷ *Ibid.*, chap. VI.

²⁸ The Commission considered these items at its 203rd meeting on 12 June 1978, at its 207th and 208th meetings on 14 June 1978 and at its 209th meeting on 16 June 1978; summary records of these meetings are contained in A/CN.9/SR.203 and 207 to 209.

session at Vienna. He noted that consequent upon the decision taken by the General Assembly under resolution 31/194 of 22 December 1976, the International Trade Law Branch, which functioned as the secretariat of the Commission, would be transferred to Vienna, and that this transfer was scheduled to take place in the summer of 1979. The Austrian authorities had extended this invitation in the belief that holding the Commission's session at Vienna would ease the transfer of the Branch to that city and that its officials could use the occasion to investigate the housing situation and familiarize themselves with the facts of life in Austria.

82. The Commission noted that, under General Assembly resolution 31/140 of 17 December 1976, United Nations bodies may hold sessions away from their established headquarters when a Government issuing an invitation for a session to be held within its territory has agreed to defray the actual additional costs directly or indirectly involved. During the discussion of this item, the representative of Austria on the Commission confirmed that his Government would defray such costs as might be directly or indirectly attributable to shifting the twelfth session from Geneva to Vienna.

83. The Commission expressed its appreciation to the Government of Austria for the invitation and decided to hold its twelfth session, of two weeks' duration, at Vienna—the dates to be determined by the Secretary of the Commission after consultation with the Austrian authorities.

B. *Seventh session of the Working Group on International Negotiable Instruments*

84. The Commission decided that the seventh session of the Working Group on International Negotiable Instruments would be held at United Nations Headquarters in New York from 3 to 12 January 1979.

C. *General Assembly resolution on the report of the Commission on the work of its tenth session*

85. The Commission took note of General Assembly resolution 32/145 of 16 December 1977 on the report of the United Nations Commission on International Trade Law on the work of its tenth session.

D. *United Nations Conference on the Carriage of Goods by Sea*

86. The Commission took note of General Assembly decision 32/438 of 16 December 1977 on the United Nations Conference on the Carriage of Goods by Sea and of a note by the Secretary-General concerning that Conference (A/CN.9/150). The above Conference was held at Hamburg, Federal Republic of Germany, from 6 to 31 March 1978. The Commission noted with appreciation that the Conference, at which 78 States were represented, had adopted the United Nations Convention on the Carriage of Goods by Sea, 1978. It expressed its hope that the Convention, which has already been signed by 15 States, would receive the widest possible acceptance.

E. *Co-operation with the Commission on Transnational Corporations*

87. The Commission took note of a letter from the Chairman of the Commission on Transnational Corporations,

in response to the offer by the Commission, made at its eighth session, to undertake work of a legal nature on subjects that might be referred to it by the Commission on Transnational Corporations (A/CN.9/148).*

F. *Current activities of international organizations related to the harmonization and unification of international trade law*

88. The Commission took note of a report of the Secretary-General on the current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/151).**

G. *Possible transfer of the International Trade Law Branch from New York to Vienna*

89. At its tenth session, the Commission noted that the General Assembly, by resolution 31/194 of 22 December 1976, had authorized the Secretary-General to put into effect, among other things, the proposal contained in paragraph 41 of his report on the utilization of office accommodation and conference facilities at the Donaupark Centre in Vienna (A/C.5/31/34), which mentions the International Trade Law Branch as one of the units to be considered for possible transfer from New York to Vienna in 1979.²⁹ In view of the fact that the International Trade Law Branch functions as the secretariat of the Commission, the Commission, at the tenth session, held an exchange of views on the effect of the proposed transfer on its work and on the question of where the Commission would hold its sessions in the event of a transfer of its secretariat to Vienna and decided to revert to the question of venue at the present session.³⁰

1. *Venue of the Commission's sessions*

90. The discussions on the venue of the Commission's sessions showed that there was considerable support for the continuation of the existing pattern of sessions, which had been authorized by the General Assembly when it established the Commission and under which the Commission met alternately at United Nations Headquarters in New York and at the United Nations Office at Geneva (see Assembly resolution 2205 (XXI) of 17 December 1966, sect. II, para. 6). The Commission noted that this pattern of sessions had been reaffirmed by the Assembly in resolution 2609 (XXIV) of 16 December 1969 and by resolution 31/140 of 17 December 1976. There was agreement that the rotation between New York and Europe should continue and that the European session might be held at Geneva or Vienna once the Commission's secretariat was established in the latter city. Accordingly, the Commission decided to recommend to the Assembly that, in respect of the Commission, the above meeting pattern, under which sessions of the Commission may be held alternately at Headquarters in New York and at Geneva or Vienna, should be maintained.

* Reproduced in this volume, part two, III.

** Reproduced in this volume, part two, V.

²⁹ *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17)*, para. 59 (Yearbook . . . 1977, part one, II, A).

³⁰ *Ibid.*, para. 68.

2. *Impact of proposed transfer of the secretariat on the Commission's work*

91. In the opinion of some representatives, it was not for the Commission to reconsider a decision of the General Assembly and these representatives were therefore of the view that the Commission should take note of Assembly resolution 31/194 without discussion. Most representatives were, however, of the opinion that it was not only within the competence of the Commission, but also the Commission's duty to ensure that the transfer would harm as little as possible the continuity and quality of its work.

92. In this connexion, the Commission expressed its conviction that, since the preparatory work carried out by its secretariat was an essential element of its own work, the International Trade Law Branch should be provided with such research facilities as would enable it to perform its task. In this respect, it was stated that the library facilities at present available in Vienna were as yet inadequate and that it was important that a proper legal reference library should be available upon the arrival of the Branch in Vienna.

93. The Commission noted that its secretariat had made arrangements for the preparation of a list of books to be included in a reference type of library and that such list would presently be available. The representative of Austria informed the Commission that his Government recognized the need for adequate research facilities for the International Trade Law Branch and was prepared to examine the list drawn up by the secretariat with a view to considering to what extent it could contribute to the establishment of a legal reference library for the Commission's secretariat in Vienna.

94. The view was expressed that the establishment of a reference library would probably take time and involve considerable expenditure. The view was also expressed that there might well be disadvantages in the reduced access to large trading interests and institutes in New York, which are frequently consulted by the Commission, and in separating the International Trade Law Branch from the Office of Legal Affairs in New York. Because of the uncertainty of the time needed for establishing a reference library and the availability of funds therefor, the Commission, after deliberation, agreed that it would be in the interest of its work that the International Trade Law Branch should not be transferred to Vienna until the time when adequate research facilities were made available.

95. The view was also expressed that it would be desirable for the General Assembly to reconsider its decision regarding the transfer of the Commission's secretariat to Vienna in the light of the issues raised by the Commission.

96. The question was also raised of the financial implications for the United Nations of the establishment of a legal reference library in Vienna and of holding sessions of the Commission and its working groups in that city. The Commission was informed that no precise indications, beyond those set forth in the report of the Secretary-General on the utilization of office accommodation and conference facilities at the Donaupark Centre in Vienna (A/C.5/31/34), could be given at this stage.

Decision of the Commission

97. Following a proposal submitted orally to the

Commission, the Commission decided to recommend to the General Assembly that it should defer the transfer of the Commission's secretariat to Vienna for a period of three years, in order to allow time for the establishment of the necessary research facilities for its secretariat, the position to be reviewed in the light of the circumstances then prevailing.

98. After this decision was taken, the Legal Counsel of the United Nations made the following statement:

"Resolution 31/194 of the General Assembly, which authorized the Secretary-General to implement his proposals regarding the transfer of units from New York and Geneva to Vienna, remains in effect. This decision is binding upon the Secretary-General and the Secretary-General will implement that decision keeping in mind only the interests of the Organization.

"The Commission, in that it is a subsidiary organ of the General Assembly, has no authority to call in question this decision on the transfer. The implementation of that decision is within the power of the Secretary-General, but the Commission could, if need be, address itself to the Secretary-General and ask him that, in the timing of the transfer, account should be taken of the research facilities available and required in Vienna.

"I have no doubt that, when planning the transfer of the International Trade Law Branch to Vienna, the Secretary-General and no doubt also the Austrian Government will be aware of the need for a substantial effort so as to create the conditions which would permit the Branch to accomplish the task conferred upon it. The Commission should have confidence in the Secretary-General and the Austrian Government that they will take decisions which are in the best interest of the Organization."

99. Following the statement by the Legal Counsel, two representatives proposed that the decision of the Commission set out in paragraph 97 above should be amended so that the recommendation contained therein would be addressed to the Secretary-General rather than to the General Assembly and so that the recommendation would not contain any period of time during which the transfer should not take place, but merely request the Secretary-General, in fixing the time of the transfer of the Secretariat, to take into consideration the time needed for the necessary research facilities to be established at Vienna. It was stated in this connexion that, since the Secretary-General had been entrusted by the General Assembly to implement the proposed transfer of certain Secretariat units, it was to him that the Commission should address the request that, in planning the transfer of the Commission's secretariat, account should be taken of the research facilities it needs.

100. Under another view, however, the Commission was not calling the decisions of the General Assembly into question, but merely requesting the Assembly to reconsider the matter in the light of certain facts that were perhaps not known to it at the time the decision was taken. It was proper that the Commission, as a subsidiary body of the Assembly, should make its recommendations to its parent body. It was also stated that the Commission should not reopen discussion on a matter on which it had already taken a decision.

101. A formal vote was taken on whether to reopen

the decision set out in paragraph 97 above.

102. By 10 votes to 5, with 9 abstentions, the Commission decided not to reopen the matter and to maintain its decision set forth in paragraph 97 above.

103. In view of this decision, two representatives expressed reservations concerning the decision of the Commission to make a recommendation to the General Assembly.

ANNEX I

Summary of deliberations of the Commission on the draft Convention on the Formation of Contracts for the International Sale of Goods

ARTICLE 1^a

1. The text of article 1 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) This Convention applies to the formation of contracts of sale of goods between parties whose places of business are in different States:

"(a) When the States are Contracting States; or
 "(b) When the rules of private international law lead to the application of the law of a Contracting State.

"(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the offer, any reply to the offer, or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

"(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the proposed contract is to be taken into consideration.

"(4) This Convention does not apply to the formation of contracts of sale:

"(a) Of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

"(b) By auction;

"(c) On execution or otherwise by authority of law;

"(d) Of stocks, shares, investment securities, negotiable instruments or money;

"(e) Of ships, vessels or aircraft;

"(f) Of electricity.

"(5) This Convention does not apply to the formation of contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

"(6) The formation of contracts for the supply of goods to be manufactured or produced is to be considered as the formation of contracts of sale of goods unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

"(7) For the purposes of this Convention:

"(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the proposed contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

"(b) If a party does not have a place of business, reference is to be made to his habitual residence."

Subparagraph (1) (b)

2. The Commission considered a proposal to renumber subparagraph (1) (b) as subparagraph (1) (b) (1) and to add the following provisions:

^a The Commission considered article 1 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 187th meeting, on 30 May 1978, and at its 202nd meeting, on 8 June 1978; summary records of these meetings are contained in A/CN.9/SR.187 and 202.

"(2) In cases in which the only question is whether this Convention applies to an offer, it so applies where the rules of private international law lead to the application to the offer of the law of a Contracting State.

"(3) In cases in which the only question is whether this Convention applies to an acceptance, it so applies where the rules of private international law lead to the application to the acceptance of the law of a Contracting State.

"(4) In cases in which the rules of private international law lead to the application of the law of a Contracting State to one or some only of the events which together constitute the formation of a contract under this Convention, the law of the Contracting State applies to all of those events."

3. This proposal was designed to deal with the problem that the rules of private international law of some legal systems apply the law of different States to different elements of the formation process, such as the offer, the acceptance and the required form.

4. This proposal was withdrawn, however, in view of the fact that a number of representatives considered that the subject of private international law was too complex to be governed by a few provisions in an article on the sphere of application of the draft Convention. If the problems which this proposal were intended to govern were to arise in a concrete case, the court or arbitral tribunal would have to solve them in the context of that case. It was also noted that, subsequent to the submission of the proposal, the Commission had decided to integrate the draft Convention on the Formation of Contracts for the International Sale of Goods and the draft Convention on the International Sale of Goods (CISG), which meant that retention of the proposal would have required considerable amendment to its wording. Finally, it was observed that the existing text of article 1, paragraph (1) (b), was a carefully worked out compromise solution between the advocates of the universal application of the draft Convention, as was the case under the 1964 Hague Conventions, and the advocates of restricting the application of the draft Convention to those cases in which both parties had their place of business in a Contracting State. It was thought that this compromise should not now be reopened.

Subparagraph (4) (e)

5. The Commission did not proceed with a suggestion that subparagraph (4) (e) clearly indicates whether the formation of contracts of sale of hovercraft are excluded from the scope of application of the draft Convention.

Decision

6. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 1 of this draft Convention was combined with articles 1, 2, 3 and 5 of the draft CISG and became articles 1, 2, 3 and 9 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of articles 1, 2, 3 and 9:

"Article 1

"(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

"(a) When the States are Contracting States; or

"(b) When the rules of private international law lead to the application of the law of a Contracting State.

"(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

"(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration."

"Article 2

"This Convention does not apply to sales:

"(a) Of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

"(b) By auction;

"(c) On execution or otherwise by authority of law;

- "(d) Of stocks, shares, investment securities, negotiable instruments or money;
- "(e) Of ships, vessels or aircraft;
- "(f) Of electricity."

"Article 3

"(1) This Convention does not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

"(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production."

"Article 9

"For the purposes of this Convention:

"(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

"(b) If a party does not have a place of business, reference is to be made to his habitual residence."

ARTICLE 2^b

7. The text of article 2 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) The parties may agree to exclude the application of this Convention.

"(2) Unless the Convention provides otherwise, the parties may agree to derogate from or vary the effect of any of its provisions as may appear from the negotiations, the offer or the reply, the practices which the parties have established between themselves or from usages.

"(3) Unless the parties have previously agreed otherwise, a term of the offer stipulating that silence shall amount to acceptance is not effective."

Paragraphs (1) and (2)

Unilateral variation or exclusion of Convention

8. There was strong support for the view that an offeror should be able to indicate in his offer that the formation of the contract would not be governed by the Convention, or to indicate the manner in which an acceptance must be made for a contract to be formed even though that might constitute a derogation from this Convention. If such unilateral exclusion or derogation from the Convention were not acceptable, then, as a minimum, an offeror should be able to stipulate that an acceptance must be in writing.

9. On the other hand, it was noted that while a unilateral exclusion of or derogation from the Convention appeared to be acceptable in the case of the offeror, it was less suitable to the case where the offeree in his acceptance attempted to exclude the application of the Convention or otherwise attempted to derogate from it.

Establishment of a Working Group on article 2

10. The Commission established a Working Group on article 2 composed of the representatives of Brazil, Egypt, Finland, India, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland. The Commission requested the Working Group to formulate a text based upon the views expressed in the Commission.

^b The Commission considered article 2 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 187th meeting on 30 May 1978, at its 191st meeting on 1 June 1978 and at its 199th meeting on 7 June 1978; summary records of these meetings are contained in A/CN.9/SR.187, 191 and 199.

11. The Working Group on article 2 proposed that paragraphs (1) and (2) of article 2 be deleted and that the following text be substituted:

"(1) The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions."

12. It was pointed out that this text was identical to article 4 of the draft CISG. This formulation avoided the difficulty of the text adopted by the Working Group on the International Sale of Goods which required an agreement to exclude or vary the Convention prior to the conclusion of the principal contract. Under the proposal of the Working Group, any requirement as to the formation of the contract contained in the offer would be treated as a normal condition in the offer. Therefore, the effect of a reply which departed from this condition would be determined by the rules contained in article 13 on replies which do not conform to the offer.

13. The proposal of the Working Group on article 2 was generally acceptable. The Commission accepted an amendment to prevent the derogation from or variation of the effect of a provision where the Convention provided otherwise.

Paragraph (3)

14. The Commission considered this paragraph in conjunction with article 12 (1), which provided that "Silence by itself shall not constitute acceptance".

15. The Commission decided to delete paragraph (3) and to retain article 12, paragraph (1), as the sole provision which governed acceptance by silence (see paras. 147 to 149 below).

Decision

16. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 2 of this draft Convention was combined with article 4 of the draft CISG and became article 5 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 5:

"Article 5

"The parties may exclude the application of this Convention or, subject to article 11, derogate from or vary the effect of any of its provisions."

ARTICLE 3^c

17. The text of article 3 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

"(2) Paragraph (1) of this article does not apply to a contract of sale where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

Paragraph (1)

Contracts of sale evidenced by writing

18. The Commission considered a proposal that article 3, paragraph (1), should not refer to contracts "evidenced by" writing, but should provide only that contracts of sale need not be concluded in writing. This proposal was supported on several grounds. One ground was that the draft Convention should not deal with matters of evidence (this view would also have entailed the deletion of the second sentence of paragraph (1), see para. 20 below). Another view was that article 3 related only to the formation of contracts with the consequence that it was sufficient to state that contracts of sale do not

^c The Commission considered article 3 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 188th meeting on 30 May 1978 and at its 195th meeting on 5 June 1978; summary records of these meetings are contained in A/CN.9/SR.188 and 195.

have to be concluded in writing, since the question of their content would be dealt with by the draft CISG. However, it was pointed out that in many common law countries a provision providing only that contracts need not be concluded in writing would not overcome national legislation which recognized contracts concluded orally but only enforced such contracts above a certain value if they were evidenced by writing.

19. In view of the difficulties that would arise for these legal systems by the deletion of the phrase that contracts need not be evidenced by writing, the Commission decided to retain this expression even though it might appear superfluous to a number of legal systems.

Modes of proving formation of contracts

20. The Commission did not retain a proposal to delete the second sentence of article 3, paragraph (1). Although there was support for the view that matters of evidence should not be dealt with by the draft Convention either because such matters were best left to national law or because the question of proof related only to the content of contracts, which was dealt with by the draft CISG, most representatives favoured the retention of the second sentence because it was important to indicate the manner in which the existence of an oral contract could be proved. It was also noted that, if article 3, paragraph (1) differed from article 11, paragraph (1), of the draft CISG, the courts of a number of legal systems would assume that a different rule was intended rather than interpreting the deletion of the second sentence as reflecting the fact that the Convention dealt only with matters of formation and not proof of the contents of a contract, which would always be established by evidence.

21. One representative expressed a reservation to the rule that the formation of a contract of sale could be established by means of witnesses.

22. The Commission considered, but did not accept, the following suggestions:

(a) That the draft Convention contain a definition of goods so that the scope of application of article 3, paragraph (1), and the scope of the draft Convention would be clearly defined;

(b) That the words "contract of sale" be eliminated from article 3, paragraph (1) and replaced by an expression which made it clear that the article governed only the form of the offer, acceptance and any negotiations, that is, the communications which led to the formation of a contract of sale.

Paragraph (2)

23. The Commission considered a proposal that paragraph (2) should read as follows:

"(2) Paragraph (1) of this article as well as any other provision of this Convention which allows a contract of sale or its modification or rescission or any offer, acceptance, or other indication of intention to be made in any other form than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

24. It was pointed out that the proposal used specific language to define the precise scope of application of the provision in order to avoid the necessity of repeating the former text as a separate paragraph of articles 3, paragraph (2), 7, paragraph (2), 12, paragraph (4) and 18, paragraph (3).

25. This proposal was referred to the Drafting Group, which was asked to consider whether this provision should be a separate article of the Convention and, if so, to formulate an appropriate text. The Drafting Group was also asked to consider whether the proposal made it clear that a declaration under article (X) excluded the application of the second sentence of article 3 (1) as well as the first sentence so that in a case where a contract had been concluded in writing but the writing had been lost, national law would govern the question of proving the fact that a contract had been formed.

26. One representative stated that the régime established by this paragraph as finally adopted by the Commission (which subsequently became article 11) did not achieve an acceptable solution to an admittedly difficult problem and reserved the right of his delegation to

dissent from the provisions of article 11 at any subsequent diplomatic conference. Another representative reserved the position of his delegation on article 11.

Decision

27. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 3 of this draft Convention was combined with article 11 of the draft CISG and became articles 10 and 11 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of articles 10 and 11:

"Article 10

"A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means including witnesses."

"Article 11

"Any provision of article 10, article 27 or Part II of this Convention that allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this article."

ARTICLE 4^d

28. The text of article 4 of the Draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) Communications, statements and declarations by and conduct of a party are to be interpreted according to his intent where the other party knew or ought to have known what that intent was.

"(2) If the preceding paragraph is not applicable, communications, statements and declarations by and conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

"(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

Article as a whole

Existence of a provision on interpretation

29. The existence of a provision which provided rules for determining a party's intent where this did not appear with sufficient clarity from his communications or conduct was generally supported as assisting in the unification and harmonization of the law relating to the formation of contracts for the international sale of goods. However, it was also argued that the restriction of the provision on interpretation to matters of formation made its retention of doubtful value.

The matters to be interpreted

30. There was considerable support for the view that the expression "communications, statements and declarations by and conduct" could be simplified. However, there was also support for the retention of the present text since it clearly indicated which matters were to be the subject of interpretation and demonstrated that the provision was restricted to the formation process.

31. There was considerable discussion on whether the rules of

^d The Commission considered article 4 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 188th meeting on 30 May 1978, at its 189th meeting on 31 May 1978 and at its 191st and 192nd meetings on 1 June 1978; summary records of these meetings are contained in A/CN.9/SR.188, 189, 191 and 192.

interpretation should be limited to the communications of each party individually or whether they should be extended to the communications of both parties taken as a whole. It was stated that the use of the phrase "communications . . . of a party" indicated that this article was aimed at the interpretation of unilateral acts such as an offer or an acceptance for the purpose of determining whether a contract had been formed. Prior to the formation of a contract there was no common intent of both parties which called for interpretation. On the other hand, it was suggested that it would be artificial to isolate the transaction into component parts because the totality of the transaction had to be examined if the true intent of each party was to be ascertained. It was pointed out that, in any event, if there was an actual common intent, this intent would prevail. After considerable deliberation the Commission decided to retain in principle the existing formulation.

Tests for determining intent

32. There was support for the view that the primary rule of interpretation should be the objective test formulated in article 4, paragraph (2). This result could be achieved by reversing the order of paragraphs (1) and (2). An objective approach was stated to be more certain and, as it would come into operation only in cases of doubt, it would usually favour the weaker party. It was also noted that although a party's subjective intent should in principle govern the interpretation to be given to his communications and conduct, that party's intention should either appear clearly from his communications and conduct, or he should have the burden of proving that the other party knew or ought to have known of his intent.

33. It was suggested that the present structure of article 4 could be altered by limiting the primary rule in paragraph (1) to cases where the other party knew of the intent. Where this knowledge did not exist the interpretation of the party's communications and conduct would be in accordance with the rules in paragraphs (2) and (3).

34. Under another view, the present structure of article 4 should be maintained. In establishing the existence of a contract the primary concern must be the subjective intent of the parties. It was only if a subjective rule was not applicable that recourse should be had to objective criteria of interpretation which, in effect, resulted in the negation of the real intent of a party and its replacement by the intent of a hypothetical reasonable party. It was suggested that the subjective nature of the rules on interpretation could be lessened if paragraph (1) was reformulated to state that communications, statements and declarations by and conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was rather than referring to what the other party knew or ought to have known. However, another view was that the original wording was preferable as it related a party's knowledge to that of a reasonable person.

Paragraphs (2) and (3)

Understanding of a reasonable person

35. It was stated that in some of the legal systems which were not familiar with the juridical concept of a reasonable person, it would be difficult to comprehend what a reasonable person would have understood if he had been in the same circumstances as the party to the formation process whose statements or other conduct were being interpreted. It was suggested that it might be possible to formulate this text in more precise terms, for instance by referring to the intent that a person placed in the same circumstances as the parties would normally have had. On the other hand, it was noted that article 4, paragraph (3), gave guidance as to the type of considerations which should be taken into account in determining the understanding of a reasonable person in the same circumstances.

Paragraph (3)

Subsequent conduct

36. It was suggested that conduct of the parties subsequent to a specific communication or conduct of a party should not be a relevant factor in the interpretation of that communication or conduct. The object of the draft Convention was to establish when a contract of sale

was formed. Any extension of the rules on interpretation to matters that occurred after this formation process would raise doubts as to the scope of the Convention. Under another view, subsequent conduct of a party could be an excellent guide to his real intention at the time that the communications in question were made. The Commission decided to retain subsequent conduct of the parties as an element in determining the intent of a party or the understanding that a reasonable person would have had in the same circumstances.

Establishment of Working Group on article 4

37. The Commission established a Working Group on article 4 composed of the representatives of Australia, Brazil, Finland, Hungary, Nigeria and Yugoslavia. The Commission requested the Working Group to formulate a text of article 4 taking into account the views expressed.

38. The Working Group on article 4 submitted the following proposal:

"(1) For the purposes of this Convention communications and statements by and conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

"(2) If the preceding paragraph is not applicable, communications and statements by and conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

"(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

39. It was pointed out that in paragraph (1) the expression "could not have been unaware what that intent was" replaced the expression "ought to have known what that intent was". This reflected the concern expressed in the Commission that the previous version of paragraph (1) contained too subjective a test. The term "declarations" had been deleted from paragraphs (1) and (2) but the Working Group retained the term "communications" to reflect the view of some members of the Working Group that the term "statements" might be understood in business circles as only referring to unilateral acts and not to such matters as business correspondence that had passed between the parties. The Working Group retained the concept of the understanding of a reasonable person in the same circumstances since it was considered that the problems caused by its retention were not serious enough to warrant attempting the difficult task of formulating an acceptable alternative.

40. The proposal of the Working Group on article 4 was generally acceptable. However, the expression "communications and statements by and conduct of party" was replaced by the expression "statements made by and other conduct of a party" since this formulation was considered simpler while at the same time it made it clear that all conduct, including communications and declarations, were encompassed by the provision.

Decision

41. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 4 of this draft Convention became article 7 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 7:

"Article 7"

"(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

"(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

"(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due

consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

ARTICLE 5^c

42. The text of article 5 of the Draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith."

43. Article 5 was the subject of lengthy discussion which revealed a difference of opinion as to whether the draft Convention should contain a provision on fair dealing and good faith.

Arguments against inclusion of a provision on fair dealing and good faith

44. There was considerable support for the deletion of article 5. This support was based on a number of grounds. It was stated that the provision merely contained a moral exhortation, which should not be included in the draft Convention. If such a moral principle were elevated to the status of a legal obligation, it became imperative to determine how it would be applied to particular transactions. Although there could be no disagreement with the principle stated in article 5, the development of a coherent body of case law was unlikely to take place, since national courts would be influenced by their own legal and social traditions in applying the article to individual cases. The resultant uncertainty was said to be detrimental to international trade. Another view against the inclusion of article 5 in the draft Convention was that the requirement of acting in good faith was implicit in all laws regulating business activity and it was consequently unnecessary to include the requirement in any specific text.

45. The retention of article 5 was also criticized on the basis that the draft Convention did not specify the consequences of a failure to observe the principles which were made binding on the parties. This failure meant that the consequences of a violation would be left to national law with the result that no uniformity of sanctions would be achieved. An illustration of this type of problem was said to be the UNIDROIT draft text on validity, which considered it necessary to regulate in great detail the consequences of fraud and threats which were clear violations of good faith. It was even more difficult to envisage uniformity in dealing with the consequences of less obvious violations of the principle of good faith. It followed that, if the draft Convention were to contain a provision on good faith, it should also contain detailed provisions spelling out the consequences of failure of a party to comply with the requisite standard, but the place for such detailed rules was in a Convention on validity of contracts rather than in a Convention on formation. It thus also followed that the proper place for a provision on good faith and fair dealing was in a Convention which dealt with the validity of contracts.

Arguments for inclusion of a provision on fair dealing and good faith

46. There was also considerable support for the retention of article 5. It was stated that, since principles of good faith were universally recognized, there seemed little harm in including them in the draft Convention. This was particularly the case when it was recalled that many national codes contained provisions similar to article 5 which had played an important role in the development of rules regulating commercial activity. It was considered that the extension of this provision into an instrument regulating an aspect of international trade was a valuable extension of a widely recognized norm of conduct. Furthermore, deletion of the provision would open the Commission to the criticism that it opposed such principles when it was clear that this type of rule was needed in international trade, particularly in relation to trade with developing countries. It was also pointed out that the concept of good faith was well recognized in public

international law and was referred to in the Charter of the United Nations.

47. Although it was generally agreed that it would be useful to set out the consequences of a violation of article 5, it was stated that it was not necessary to specify the consequences of a violation of the article, as this could be determined by the courts in a flexible manner having regard to the particular facts of each case. The development of a body of case law would reduce initial uncertainty as to the effects and scope of the provision. In any case, even without sanctions the existence of the provision would draw the attention of the parties and the court to the fact that high standards of behaviour were expected in international trade transactions.

48. Adoption of the provision was also considered to be a modest implementation of some of the principles of the new international economic order and could have the practical effect of lessening undesirable or discriminatory trade practices, particularly if a similar provision were inserted into the draft CISG.

The concept of the "principles of fair dealing"

49. The requirement in article 5 that the parties "must observe the principles of fair dealing" was criticized by a number of representatives who otherwise supported the retention of the article. It was stated that the expression "fair dealing" could be taken to refer to the current standards of international business practices which, from the point of view of many developing countries, could hardly be considered as "fair". The risk of elevating these current standards of business practice into norms of conduct recognized and upheld by an international convention led to the conclusion that the concept of "fair dealing" should be deleted. It was tentatively suggested that the expression "*loyauté commerciale*" in the French language version was perhaps less open to criticism.

50. It was proposed that the replacement of the expression "fair dealing" by "international co-operation" would overcome many of these difficulties. The use of the expression "international co-operation" would make it clear that present international business standards were not necessarily the appropriate criteria by which a particular international transaction was to be judged. Furthermore, "international co-operation" was a well-known public international law concept which could usefully be introduced into a private law convention dealing with international trade which affected the interests of States and was thus susceptible to the use of public law concepts. The introduction of a requirement that the parties must observe the principles of "international co-operation" also made it clear that national law conceptions of good faith were not automatically appropriate to international trade transactions, but had to be evaluated by a court to ascertain whether they were appropriate to the particular transaction having regard to the fact that international co-operation was to be encouraged.

51. It was also pointed out that the principle of "international co-operation" was used in international trade conditions governing trade between certain socialist countries and the basis of the principle was simply that a commercial contract was not an adversary relationship, but that the parties were under an obligation to co-operate to overcome difficulties. Article 59 of the draft CISG, which dealt with mitigation of damages, was said to be a particular application of this general principle.

52. The use of the expression "international co-operation" as a standard by which to measure acts of the parties in the formation of international contracts of sale goods, however, was opposed by many representatives. It was pointed out that this expression did not specify the scope and effect of the obligation that was being imposed on the parties to a commercial contract. The view was also expressed that, although it might be feasible for a court, by using expert testimony, to ascertain whether a particular transaction complied with principles of fair dealing, it was difficult to apprehend how a transaction could be objectively evaluated to ascertain whether it complied with the standards of "international co-operation".

Possible compromise solutions

53. In view of the serious differences of opinion as to the inclusion of article 5 in the draft Convention, there was general agreement that strenuous efforts should be made to seek a compromise solution. The

^c The Commission considered article 5 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 190th meeting on 31 May 1978, at its 191st meeting on 1 June 1978 and at its 201st meeting on 8 June 1978; summary records of these meetings are contained in A/CN.9/SR.190, 191 and 201.

alternative of either deleting or retaining article 5 by a slender majority was considered unacceptable to most representatives.

54. A number of possible compromise solutions were canvassed. The proponents of these compromise solutions noted that in all cases the absence of sanctions did not raise the problems encountered in relation to the formulation contained in article 5. It was suggested that the substance of article 5 could be contained in a preamble to the Convention, but this was met with the objection that this would make it devoid of effect. Another suggestion was that the requirement of the observance of good faith could be incorporated into the rules of interpretation of the statements and conduct of the parties. Against this suggestion was the view that article 5 was not concerned with the intent of the parties, but sought to lay down a standard of behaviour to which the parties must conform. A more widely supported compromise suggestion was that the principle of the observance of good faith could be incorporated into an article on the interpretation and application of the provisions of the Convention. This suggestion was criticized on the basis that it was not really appropriate to direct the requirement of good faith to the courts rather than to the parties.

Establishment of a Working Group on article 5

55. The Commission established a Working Group on article 5, composed of the representatives of Finland, Hungary, Mexico, Singapore, Uganda and the United Kingdom of Great Britain and Northern Ireland, and requested the Working Group to formulate a compromise proposal taking into account all the views expressed during the course of the discussion on article 5.

56. The Working Group proposed that the following new article, based on article 13 of the draft CISG, should be adopted:

"In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and to observe good faith in international trade."

57. In explanation of this proposal it was stated that the Working Group had attempted to find an acceptable compromise on a question which had sharply divided the Commission. The first part of the proposal reproduced article 13 of the draft CISG and sought to require courts and arbitral tribunals to promote uniformity of interpretation of the Convention. The second part of the proposal was intended to direct the attention of the courts in resolving disputes to the fact that the acts and omissions of the parties must be interpreted in the light of the principle that they observe good faith in international trade. The provision was intended to apply to both the rules on formation and the rules on sales.

58. Although several representatives still preferred the original version of article 5, while other representatives still favoured deletion of all reference to the need to observe the principles of good faith, the proposal was generally supported as containing a realistic compromise solution. It was stated, however, that the proposal did not make it clear that the need to observe good faith in international trade was also directed to the parties to an international sales transaction. It was also stated that the proposed wording did not make it clear that the need to promote uniformity referred to the need to promote uniformity of interpretation of the Convention and not uniformity in international trade in general.

59. Under one view, the Convention should not contain a provision on interpretation because, according to the constitutions of some countries, it was not possible for a legal text to instruct the courts on the manner in which it should be interpreted. It was also stated that the requirement to promote uniformity should be imposed on States and not upon courts and arbitral tribunals, since this requirement was contained in a public international law convention. However, the generally accepted view was that the provision was properly directed to courts and arbitral tribunals, since it was these bodies which would resolve disputes between the parties to an international trade transaction.

Decision

60. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report), article 5 of this draft Convention was merged with article 13 of the draft CISG and became article 6 of the draft Convention on Contracts

for the International Sale of Goods. The Commission adopted the following text of article 6:

"Article 6"

"In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and the observance of good faith in international trade."

ARTICLE 6^f

61. The text of article 6 of the Draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"For the purposes of this Convention, usage means any practice or method of dealing of which the parties knew or ought to have known and which in international trade is widely known to and regularly observed by parties to contracts of the type involved in the particular trade concerned."

62. The Commission adopted this provision and referred the question of its location to the Drafting Group.

Decision

63. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 6 of this draft Convention was merged with article 7 of the draft CISG and became article 8 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 8:

"Article 8"

"(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

"(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

ARTICLE 7^g

64. The text of article 7 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) For the purposes of this Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

"(2) Paragraph (1) of this article does not apply to an offer, declaration of acceptance or any other indication of intention if any of them is made in any other form than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

Paragraph (1)

Place of business or mailing address

65. The Commission considered a suggestion to delete the words

^f The Commission considered article 6 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 192nd meeting on 1 June 1978; a summary record of this meeting is contained in A/CN.9/SR.192.

^g The Commission considered article 7 of the draft convention on the Formation of Contracts for the International Sale of Goods at its 196th meeting on 7 June 1978; a summary record of this meeting is contained in A/CN.9/SR.196.

"or, if he does not have a place of business or mailing address, to his habitual residence". This suggestion was based on the fact that article 1, paragraph (7) (b), provides that, "if a party does not have a place of business, reference is to be made to his habitual residence". However, it was generally considered preferable to retain the existing language of paragraph (1) since article 1, paragraph (7) (b), did not refer to "mailing address". The Commission, accordingly, did not retain the suggestion.

66. The Commission did not retain proposals that (a) the expression "place of business" should be replaced by the expression "principal place of business" and that (b) the term "mailing address" should be deleted as unnecessary.

Habitual residence

67. It was pointed out that in private international law the term "habitual residence" had developed a fairly settled meaning of residence in a particular country or province within a country. It was accordingly suggested that possible confusion would be avoided by the use of terms such as "normal residence" or "usual residence" instead of "habitual residence".

68. The Commission did not retain this suggestion, since the term "habitual residence" had already been adopted in the draft CISG. An observer reserved the position of his delegation in respect of this decision.

69. The Commission also considered, but did not retain, the following proposals:

(a) That the term "habitual residence" should be deleted, since it was difficult to envisage the case of a businessman engaged in the international sale of goods who had neither a business address nor a mailing address;

(b) That the Convention should permit the sending of a communication to the "habitual residence" of the addressee only if the sender did not know the place of business or mailing address of the addressee.

Oral communications

70. The Commission did not retain a suggestion that, before an oral communication could have been considered to have reached the addressee, it would have had to have been understood by him.

Paragraph (2)

71. As a consequence of its decision in relation to article 3, paragraph (2) (see paras. 23 to 27 above), the Commission deleted this paragraph.

Decision

72. The Commission retained the substance of article 7, paragraph (1), and deleted article 7, paragraph (2). As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 7 of this draft Convention became article 22 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 22:

"Article 22"

"For the purposes of part II of this Convention, an offer, declaration of acceptance or any other indication of intention 'reaches' the addressee when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence."

ARTICLE 8^b

73. The text of article 8 of the draft Convention on the Formation

^b The Commission considered article 8 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 192nd meeting on 1 June 1978, at its 193rd meeting on 2 June 1978, at its 196th meeting on 5 June 1978 and at its 201st meeting on 8 June 1978; summary records of these meetings are contained in A/CN.9/SR.192, 193, 196 and 201.

of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

"(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

"(3) A proposal is sufficiently definite if it indicates the kind of goods and fixes or makes provision for determining the quantity and the price. Nevertheless, if a proposal indicates the intention to conclude the contract even without making provision for the determination of the price, it is considered as proposing that the price be that generally charged by the seller at the time of the conclusion of the contract or, if no such price is ascertainable, the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances."

Paragraph (1)

Definition of offer

74. The substance of the rule contained in paragraph (1) was generally considered to be satisfactory.

Paragraph (2)

Proposals to the public

75. It was suggested that proposals addressed to the public should be treated in the same way as proposals addressed to specific persons. Consequently, if any proposal indicated an intention to be bound and if it were sufficiently definite, it should be treated as an offer. This result could be achieved by deleting article 8, paragraph (2), and deleting the word "specific" in article 8, paragraph (1).

76. On the other hand, it was stated that proposals to the public were sufficiently different in character from proposals to specific persons to justify the assumption that they constituted mere invitations to make offers unless the contrary were clearly indicated by the person making the proposal. There was also support for the view that proposals to the public relating to the international sale of goods should always be considered as invitations to make offers.

77. Another view suggested that the question of public offers should be left to national law or regulated in detail in a separate instrument.

78. After extensive deliberation, the Commission decided to retain article 8, paragraph (2), and the word "specific" in article 8, paragraph (1).

Paragraph (3)

Definition of sufficiently definite

79. The substance of the rule contained in the first sentence of paragraph (3) was considered to be generally acceptable. It was suggested, however, that the expression "kind of goods" should be made more precise by deleting the words "kind of" in order to indicate that an offer must specify the type and nature of the goods and not merely their generic description.

80. It was stated that there was a possible inconsistency between the rule in the first sentence, requiring that the offer should fix or make provision for the determination of the price, and the rule in the second sentence, which implied a price if the offer, although indicating the intention of the offeror to be bound to a contract in case of acceptance, did not itself fix or make provision for the determination of the price. It was suggested that this possible inconsistency could be overcome by redrafting the first sentence in the negative so that it would provide that a proposal would not be sufficiently definite unless it indicated the kind of goods and made provision for determining the quantity and the price. This redrafting should make it clear that a particular transaction might require additional elements for a contract to be concluded and should retain the rule that no contract of sale can be formed without those three elements. The redrafting should also make it clear that, under the second sentence, an agreement in re-

spect of one of these three elements, namely, the price, could be implied only in certain specifically defined cases.

Possible additional elements to definition of sufficiently definite

81. The Commission did not retain a suggestion that, if a proposal were to be considered sufficiently definite, it must indicate the time of payment and delivery as well as the kind of goods and fixing or making provision for determining the quantity and the price.

Proposals not fixing or making provision for determination of price.

82. There was considerable support for the view that a proposal could not be considered an offer and thus lead to the formation of a contract by acceptance, if it did not either fix the price or make provision for its determination. The price was an essential ingredient of a contract and consequently it was unsatisfactory to impose a price on the parties when there had been no express or implicit agreement by the parties on this price.

83. Under another view it was very important to recognize the realities of international trade where contracts were formed without the price, or the manner of its determination, being indicated in the offer. It was said that such contracts were entered into in respect of commodity transactions or where orders were placed for spare parts when the cost of the spare parts was insignificant compared to the value of lost production that would be caused by failure to repair defective machinery promptly.

84. It was also pointed out that the second sentence of paragraph (3) would operate only when the person making the proposal had intended to be bound to a contract, even though no provision for the price or its determination had been included in the offer.

Criteria used for determination of price

85. There was considerable criticism of the mechanism by which article 8, paragraph (3), established price. This criticism was largely directed against selecting the price generally charged by the seller. It was considered that such a selection did not take into account the interests of the buyer, since he might have been entitled to special discounts. In addition, since price was the subject of agreement between the parties, an implied price in the absence of agreement should be no more than a reasonable price.

86. Criticism was also directed against the use of the concept of a generally prevailing price for goods sold under comparable circumstances, since this again emphasized the interests of the seller. It was stated in this connexion that such a concept would be difficult to apply, since discriminatory pricing was prevalent in many branches of international trade, particularly in relation to trade affecting developing countries.

Relationship of provision to article 37 of the draft CISG¹

87. Under one view, the existence of the second sentence of article 8, paragraph (3), should be accepted by those delegations who did not express reservations to article 37 of the draft CISG, which envisaged the formation of contracts which did not fix a price or make provision for its determination. It was pointed out, however, that article 37 of the draft CISG was expressly dependent upon the valid conclusion of a contract and that, consequently, acceptance of article 37 merely indicated willingness to let the matter be determined by national law and not a willingness to accept a binding provision in an international convention that a contract for the international sale of goods may be validly concluded without fixing a price or making provision for its determination.

¹ Article 37 of the draft CISG provides:

"If a contract has been validly concluded but does not state the price or expressly or impliedly make provision for the determination of the price of the goods, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances."

As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 37 of the draft CISG became article 51 of the draft Convention on Contracts for the International Sale of Goods.

Compromise proposals

88. In view of the differences of opinion as to the rule contained in the second sentence of article 8, paragraph (3), it was generally agreed that it was essential to formulate a compromise solution rather than to retain or delete the second sentence, which would, in either case, be unacceptable to many representatives.

89. Although it was noted that some contracts for the international sale of goods were formed without reference to a price or without making provision for the determination of a price, it was observed that, in these cases, the fixation of the price or the manner of its determination was common knowledge in the trade concerned, followed from prior dealings of the parties or resulted from implicit reference to published price lists. The discussion showed that the basic difficulty with the rule contained in the second sentence of article 8, paragraph (3), was that it appeared to some to apply in the absence of these or similar considerations. Consequently, there was considerable support for a compromise suggestion that the rule implying a price in the second sentence of article 8, paragraph (3), be limited to cases where the price or the manner of its determination was implicit in the proposal because of prior dealings between the parties or because of common knowledge in the trade concerned.

Establishment of a Working Group on article 8

90. The Commission established a Working Group, composed of the representatives of Australia, Brazil, Finland, France, Hungary, Kenya, Singapore, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland and requested it to present a text of article 8, paragraph (3), that would take account of the deliberations of the Commission.

91. The Working Group proposed that article 8, paragraph (3), be deleted and that a new second sentence be added to article 8, paragraph (1), which would then read as follows:

"(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price."

92. The Commission adopted the above proposal. A representative indicated that he supported the proposal as a compromise solution only and was, in principle, opposed to the rule that a proposal was sufficiently definite if it implicitly fixed or implicitly made provision for determining the price.

Decision

93. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 8 of this draft Convention became article 12 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 12:

"Article 12"

"(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

"(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal."

Proposed article on the formation of contracts other than by offer and acceptance²

94. The Commission considered a proposal that article 8 of the

² The Commission considered the question of the formation of contracts other than by offer and acceptance at its 192nd meeting on 1 June 1978, at its 193rd meeting on 2 June 1978, at its 195th meeting on 5 June 1978 and at its 200th meeting on 7 June 1978; summary records of these meetings are contained in A/CN.9/SR.192, 193, 195 and 200.

draft Convention on the Formation of Contracts for the International Sale of Goods should contain an additional paragraph as follows:

"A contract is concluded when the parties thereto have manifested their mutual agreement to its provisions."

95. In support of the proposal, it was stated that the new paragraph sought to deal with the formation of contracts which were not concluded by the normal exchange of offer and acceptance, but resulted from, for example, lengthy negotiations and the signing of a single document, which contained the agreement. The provision was also seen as stating an important declaration of principle applicable to all contracts.

96. The proposal was opposed on the ground that the provision could not apply to the formation of all contracts, since it was inconsistent with other rules in the draft Convention, for example, article 17 on the time of conclusion of the contract. It was also difficult to reconcile the proposal with provisions such as article 13, paragraph (2), which permitted the formation of a contract even though there was not a complete manifestation of mutual agreement. Furthermore, there was implicit in the proposal the suggestion that the contract was complete when consent had been expressed rather than when it reached the other party in accordance with article 12.

97. There was support, however, for a modified restricted proposal which, in its final form, provided for the insertion of the following separate article in the draft Convention:

"A contract of sale of goods may be formed by the parties' manifestation of mutual assent to its provisions even though it is not possible to identify an offer and acceptance."

98. The support for this proposal, which clearly indicated that it did not deal with the formation of contracts by the exchange of offer and acceptance, was based on the view that, although many legal systems would view the provision as unnecessary, the fact that it would assist the courts of some other legal systems justified its introduction into the draft Convention. It was crucial, however, to distinguish carefully the provision from the other articles in the draft Convention which dealt with the formation of contracts by offer and acceptance so that the general principle stated in the proposal would not conflict with the detailed rules contained in the draft Convention.

Establishment of Working Group

99. The Commission established a Working Group, composed of the representatives of Chile, Greece, Ireland, Japan, Poland, Uganda and the United Kingdom of Great Britain and Northern Ireland and requested it to prepare the text of a separate article dealing with the formation of contracts where it was not possible to identify an offer and an acceptance. The Working Group was also requested to suggest an appropriate location for such a provision.

100. The Working Group initially proposed the following text:

"A contract of sale is deemed to be formed if there is the mutual assent of the parties to form it, even though it is not possible to establish an offer and an acceptance."

101. As members of the Working Group were divided on the adequacy of this formulation, however, the Working Group decided to withdraw the initial proposal and adopt as the proposal of the Working Group the following proposal of a member of the Working Group which, in its final form, provided as follows:

"Formation of a contract of sale is not precluded by the fact that the mutual assent of the parties cannot be established by reference to an exchange of offer and acceptance."

102. This variant of the initial proposal sought to overcome the difficulty inherent in a positive statement that a contract is deemed to be formed if there is mutual assent, even though there is no offer or acceptance.

103. There was considerable opposition to this modified proposal, to the initial proposal and to a number of other variants proposed during the discussion, largely because of the difficulties inherent in some legal systems to accept as a statement of principle that a contract of sale of goods can be formed without the existence of an offer or an acceptance. Although these legal systems admitted that on occasion it would be difficult or impossible to identify which communications constituted the offer and acceptance, it was nevertheless essential that an offer and acceptance existed for a contract of sale to be formed. The proposals were also criticized because of the diffi-

culty of reconciling them with articles 12 and 17. It was further stated that a provision in the draft Convention based on the proposals before the Commission was unnecessary since, for many legal systems, the principle contained in the proposals was self-evident.

104. The proposals were withdrawn because of the extreme difficulty of formulating an acceptable text.

Proposed article on identical cross offers^k

105. The Commission considered a proposal that the following provision be inserted as an additional paragraph of article 8 of the draft Convention:

"Identical cross offers shall be treated as a manifestation of a mutual agreement binding on an offeror unless he promptly notifies the other offeror that he does not hold himself bound."

106. This proposal was designed to deal with a problem which had been left unresolved by the 1964 Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).

107. The generally prevailing view was that a provision on identical cross offers was unnecessary since such offers would occur only rarely in international trade. Furthermore, the insertion of the proposal into the draft Convention would raise a number of difficulties which would require considerable redrafting of other provisions of the Convention. In particular, consideration would have to be given to the application of the rule in article 17 as to the time of formation of the contract and to the rule in article 12, paragraph (1), that silence shall not in itself amount to acceptance. It might also be necessary to define "identical cross offers". It was further pointed out that the assumption implicit in the proposal that all cross offers were revocable ran counter to the interests of international trade. Under another view the proposed article was unnecessary since the draft Convention already provided an adequate solution, i.e. that offers must be accepted for a contract to be formed.

108. In view of these considerations, the proposal was withdrawn.

ARTICLE 9^l

109. The text of article 9 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"The offer becomes effective when it reaches the offeree. It is withdrawn if the withdrawal reaches the offeree before or at the same time as the offer even if it is irrevocable."

Withdrawal of communications in general

110. The Commission did not retain a suggestion that the draft Convention contain a provision dealing with the withdrawal of communications in general.

Distinction between "withdrawal" and "revocation"

111. It was generally considered useful to maintain the distinction between the ability of an offeror to withdraw an offer before or at the same time that it became effective and the ability of an offeror to revoke an offer which had taken effect. The purpose of this distinction was to make it clear that an irrevocable offer could be withdrawn before or at the same time as it took effect. After an irrevocable offer took effect it could no longer be revoked. The question of revocation of a revocable offer which had taken effect was dealt with by article 10 (1). While this distinction was accepted, there was considerable support for the view that the language of article 9 should be modified to distinguish clearly between "withdrawal" and "revocation".

^k The Commission considered the question of identical cross offers at its 194th meeting on 2 June 1978 and its 195th meeting on 5 June 1978; summary records of these meetings are contained in A/CN.9/SR.194 and 195.

^l The Commission considered article 9 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 196th meeting on 5 June 1978 and its 201st meeting on 8 June 1978; summary records of these meetings are contained in A/CN.9/SR.196 and 201.

Establishment of a Working Group

112. The Commission established a Working Group composed of the representatives of Finland, Ghana, Hungary, Japan, Kenya, Mexico, the Philippines, the Union of Soviet Socialist Republics and the United States of America to consider articles 9 and 10. The Commission requested the Working Group to clarify the text of article 9 in order to distinguish between the withdrawal of an offer and its revocation.

113. The Working Group proposed the following text of article 9:

"The offer becomes effective when it reaches the offeree. It may be withdrawn before becoming effective if the withdrawal reaches the offeree before or at the same time as the offer even if the offer is irrevocable."

114. In explanation of this text, it was noted that its objective was to distinguish clearly between withdrawal of an offer and the revocation of an offer. This was achieved by providing that the offer may be withdrawn "before becoming effective".

115. While there was considerable support for this provision, opinions were divided on the question whether the words "before becoming effective" were necessary. The Commission, after deliberation, adopted the substance of article 9 and referred the text to the Drafting Group.

Decision

116. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 9 of this draft Convention became article 13 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 13:

"Article 13"

"(1) An offer becomes effective when it reaches the offeree.

"(2) An offer may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. It may be withdrawn even if it is irrevocable."

ARTICLE 10^m

117. The text of article 10 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) The offer is revoked if the revocation reaches the offeree before he has dispatched his acceptance.

"(2) However, an offer cannot be revoked:

"(a) If the offer indicates that it is firm or irrevocable; or

"(b) If the offer states a fixed period of time for acceptance; or

"(c) If it was reasonable for the offeree to rely upon the offer being held open and the offeree has acted in reliance on the offer."

Paragraph (1)

118. The scope of paragraph (1) was criticized on the ground that the provisions did not take account of oral acceptance or acceptance by other conduct which becomes effective when brought to the knowledge of the offeror or acceptance by an act which, by virtue of article 12, paragraph (3), becomes effective when performed. It was suggested that this problem could be overcome by providing that the offer may be revoked as long as it has not been accepted or notice of acceptance has not been dispatched to the offeror.

119. Another difficulty with article 10, paragraph (1), was said to be that the terminal point for revocation of an offer was the dispatch of an acceptance which event was anterior to the formation of the contract. It was considered that the right to revoke an offer should, in principle, exist until a contract had been formed.

Subparagraph (2) (a)

120. The use of the expression "firm or irrevocable" was criticized on the basis that the word "firm", although understood by some legal systems as being synonymous with irrevocable, could be understood in other legal systems as merely referring to a proposal that was intended by the offeror to bind him and was sufficiently definite to constitute an offer. The result would be that all offers could be considered as irrevocable, which would contradict the general principle of revocability of offers contained in article 10, paragraph (1).

Subparagraph (2) (b)

121. Under one view, the rule that an offer may not be revoked if it states a fixed period of time for acceptance constituted a trap for offerors in those countries whose legal systems differentiate between fixing a time on the expiration of which the offer would lapse and fixing a time until which an offer may not be revoked. The existence of article 10, paragraph (2) (b), was said to be particularly inappropriate to govern the formation of contracts between merchants from common law systems, since the draft Convention automatically made an offer irrevocable if it stated a fixed period of time for acceptance, even though the intention of the offeror in making the statement was merely to indicate the point of time at which the offer lapsed. It was stated that this difficulty could not be completely overcome by the rules on interpretation or the rule contained in article 10, paragraph (2) (c). Accordingly, it was proposed that article 10, paragraph (2) (b), should be deleted.

122. However, under another view, the entire structure of article 10 must be viewed as a compromise between legal systems which considered offers to be generally irrevocable and legal systems which considered offers to be generally revocable. This compromise solution should be retained since a further departure from the rule that offers were irrevocable would cause great difficulty to merchants who were used to such a rule. Furthermore, article 10, paragraph (2) (b), implemented the desirable policy goal in international trade transactions of protecting an offeree from an arbitrary revocation of an offer. This was particularly important, since it was clear that article 5 on fair dealing and good faith would not be retained in its original form. It was also observed that the present wording of article 10, paragraph (2) (b), was clear so that it should not cause any lasting difficulty to merchants familiar with a different rule.

123. In view of this divergence of opinion, the Commission considered it desirable to attempt to formulate some further compromise solution and referred the matter to the Working Group on articles 9 and 10 (see para. 112 above).

Subparagraph (2) (c)

124. The Commission decided not to adopt a proposal to delete this provision since article 10, paragraph (2) (c), was generally considered as providing protection to an offeree who had to carry out investigations or make inquiries before deciding whether to accept an offer.

125. It was suggested that the provision should make it clear that it would apply also where an offeree, in reliance on the offer, had failed to act, for example, by failing to take advantage of an alternate source of supply.

126. There was some support for the view that article 10, paragraph (2) (c), should apply only if the offeror knew that the offeree had relied on the offer or if this reliance derived from an act of the offeror.

Working Group on articles 9 and 10

127. The Working Group on articles 9 and 10 (see para. 112 above) was requested to formulate a text of article 10 based on the deliberations in the Commission.

128. The Working Group proposed the following text of article 10:

"(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched his acceptance.

"(2) However, an offer cannot be revoked:

^m The Commission considered article 10 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 196th meeting on 5 June 1978, at its 197th and 198th meetings on 6 June 1978 and at its 202nd meeting on 8 June 1978; summary records of these meetings are contained in A/CN.9/SR.196, 197, 198 and 202.

"(a) If the offer indicates that it is irrevocable; or

"(b) If the offer states a fixed period of time for acceptance, unless the offer clearly states it is intended to refer only to the termination of the offer or the termination is evident because of the operation of article 2, paragraph (2); or

"(c) If it was reasonable for the offeree to rely upon the offer as being irrevocable and the offeree has acted in reliance on the offer."

Paragraph (1)

129. In explanation of the Working Group proposal, it was stated that article 10, paragraph (1), in conjunction with the proposed wording of article 9, clarified the distinction between a withdrawal of an offer and its revocation. It was also intended to deal with oral acceptances and acceptances by an act under article 12, paragraphs (1) and (3). The proposal was said to achieve this purpose by providing that the offeror may revoke his offer if the revocation reaches the offeree before he has dispatched his acceptance, but that this right would not apply if the contract had already been concluded.

130. It was considered that the proposal did not meet the problem that, in the case where an acceptance was not effective until it reached the offeror, the right to revoke the offer was lost prior to the formation of the contract.

131. The Commission decided to adopt the substance of paragraph (1) as proposed by the Working Group on articles 9 and 10.

Subparagraphs (2) (a) and (2) (b)

132. In explanation of the proposals of the Working Group, it was stated that the draft text sought to reach a compromise between the view that, if the offer stated a fixed time for acceptance, it was always to be considered as irrevocable and the view that fixing a period of time for acceptance merely indicated the period during which the offer could be accepted. The Working Group sought to achieve this compromise by providing that the offer cannot be revoked if it states a fixed period of time for acceptance unless it clearly states that this fixed period of time for acceptance is intended to refer only to the time at which the offer terminates or that this result is achieved by virtue of the operation of article 2, paragraph (2), of the draft Convention.

133. However, under one view this attempted compromise was still unsatisfactory, since the primary rule remained that the consequence of stating a fixed period of time in an offer was the conversion of the offer into an irrevocable offer. The exception of a clear contrary statement of intent was very unlikely in practice, as was the likelihood of a court determining that the operation of the primary rule would be avoided through the application of article 2, paragraph (2).

134. In view of these objections to the text proposed by the Working Group, a further compromise text derived from article 5, paragraph (2), of ULF was considered by the Commission. This text combined article 10, paragraph (2), subparagraphs (a) and (b), into a single provision as follows:

"(2) However, an offer cannot be revoked:

"(a) If it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or"

135. In support of this proposal, it was stated that the principal test to determine that an offer could not be revoked was whether the offer indicated that it was irrevocable. Whether the offer was irrevocable could be determined by the fact that it stated a fixed time for acceptance or otherwise. However, the mere fact of stating a time for acceptance would not automatically lead to the result that the offer was irrevocable if, under the circumstances of the case, such a result was not intended. In particular, it was said, where a merchant from one common law country made an offer to a merchant from another common law country, the fixing of a time for acceptance without more would not indicate that the offer was irrevocable.

136. However, there was considerable support for the view that the interpretation placed on the words of the text by its proposers was unjustified. It was considered that this text clearly adopted the rule that, if the offer stated a fixed time for acceptance, it automatically was irrevocable.

137. The Commission decided to accept the wording of the compromise proposal to combine article 10, paragraph (2), subparagraphs (a) and (b).

Subparagraph (2) (c)

138. There was a difference of opinion as to whether the text proposed by the Working Group encompassed cases where the offeree failed to act because he relied on the offer. The Commission adopted the text proposed by the Working Group.

Decision

139. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 10 of this draft Convention became article 14 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 14:

"Article 14

"(1) Until a contract is concluded, an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

"(2) However, an offer cannot be revoked:

"(a) If it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

"(b) If it were reasonable for the offeree to rely upon the offer as being irrevocable and the offeree has acted in reliance on the offer."

ARTICLE 11ⁿ

140. The text of article 11 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror."

141. The Commission adopted the substance of article 11. The Commission did not accept a suggestion that the draft Convention should deal with the question whether an offer is terminated on the death or bankruptcy of the offeror, since it was impractical to attempt to deal with these complex problems, and especially those raised by bankruptcy.

Decision

142. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 11 of this draft Convention became article 15 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 15:

"Article 15

"An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror."

Other matters relating to offers

Lapse of offers

143. Under one view, it would be desirable to have a separate provision in the draft Convention which indicated at what moment of time an offer would lapse. The following proposal was placed before the Commission:

"An offer lapses when

"(a) The period fixed by it expires; or

"(b) If no period is fixed, upon expiry of a reasonable time, due account being taken in this regard of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror."

144. Under another view, this matter was already regulated by article 12, paragraphs (2) and (3). The proposal was withdrawn when it became evident that there was not sufficient support for the re-

ⁿ The Commission considered article 11 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 198th meeting on 6 June 1978; a summary record of this meeting is contained in A/CN.9/SR.198.

structuring of other provisions, which would have been necessary if the proposal had been adopted.

Revocation of public offers

145. A proposal, namely, that public offers be considered as revoked when the offeror had taken reasonable steps to bring the revocation to the attention of those to whom it was addressed, was withdrawn in view of the fact that, under article 8 (2), there would be few occasions in which a public offer would constitute an offer capable of acceptance.

ARTICLE 12^o

146. The text of article 12 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) A declaration or other conduct by the offeree indicating assent to an offer is an acceptance. Silence shall not in itself amount to acceptance.

"(2) Subject to paragraph 3 of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. It is not effective if the indication of assent does not reach the offeror within the time he has fixed or if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

"(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed provided that the act is performed within the period of time laid down by the second and third sentences of paragraph (2) of this article.

"(4) This article does not apply to the acceptance of an offer in so far as the acceptance is allowed otherwise than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

Paragraph (1)

147. The Commission had previously decided to consider the text of article 2, paragraph (3), in conjunction with article 12, paragraph (1) (see para. 15 above).

148. The Commission deleted article 2, paragraph (3), since it was generally agreed that silence in itself should not constitute acceptance; but silence could constitute acceptance if this had been previously agreed upon between the parties or resulted from prior dealings between them or from usage.

149. One representative indicated that, in his view, the only occasion when silence should be permitted to constitute acceptance was when this had been previously agreed upon between the parties.

Paragraphs (2) and (3)

150. The Commission adopted the substance of these provisions.

Paragraph (4)

151. The Commission deleted this provision as a consequence of its reformulation of article 3, paragraph (2) (see para. 27 above).

Decision

152. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's

report above), article 12 of this draft Convention became article 16 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 16:

"Article 16"

"(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence shall not in itself amount to acceptance.

"(2) Subject to paragraph 3 of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

"(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed provided that the act is performed within the period of time laid down in paragraph 2 of this article."

ARTICLE 13^p

153. The text of article 13 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) A reply to an offer containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

"(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance."

Paragraph (1)

154. The Commission adopted a proposal that the wording of paragraph (1) be clarified to ensure that a reply which merely made inquiries or suggested the possibility of additional or different terms did not constitute a counter-offer since paragraph (1) was designed to apply to a reply which purported to be an acceptance of the offer.

155. The Commission did not accept a proposal that a reply to an offer containing additions, limitations or other modifications does not reject the offer, but only constitutes a counter-offer. It was generally agreed that it was important to state expressly that a counter-offer rejects the offer so that, under article 11, the offer would be terminated. Under such a rule the original offeree could not accept the original offer at a later point in time if his counter-offer was rejected.

Paragraph (2)

Deletion of paragraph (2)

156. Under one view, it was preferable to delete paragraph (2), since the formation of a contract of sale necessarily implied that the parties had agreed, that is, that the acceptance matched the offer. In addition, article 13, paragraph (2), would cause great uncertainty in international trade and would lead to divergent judicial interpretations in ascertaining whether an addition materially altered the terms of the offer.

157. However, under another view, article 13, paragraph (2), was

^o The Commission considered article 12 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 199th meeting on 7 June 1978; a summary record of this meeting is contained in A/CN.9/SR.199.

^p The Commission considered article 13 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 199th meeting on 7 June 1978 and at its 202nd meeting on 8 June 1978; summary records of these meetings are contained in A/CN.9/SR.199 and 202.

considered to be a very useful provision having regard to the fact that, in the international sale of goods, offers and acceptances were frequently communicated by means of filling in the particular details of a transaction in printed forms, which would normally contain differences among the printed terms. In such a case, the parties might assume that a contract has been formed but, at a later date, one of the parties might, after a careful scrutiny of the printed terms, be able to avoid the obligations that he had undertaken to perform by demonstrating that no contract had been formed. In addition, it was stated that an offeror, assuming the conclusion of a contract, might accept goods and this might be construed as the acceptance which forms the contract thus preventing him from claiming damages for late delivery. Article 13, paragraph (2), would avoid these undesirable results while giving the offeror the opportunity to object to the reply, which contained non-material alterations to the offer.

158. After considerable deliberation, the Commission decided to retain the principle contained in article 13, paragraph (2).

Scope of application of rule in article 13, paragraph (2)

159. Under one view, article 13, paragraph (2), should be limited to mere differences in wording, grammatical changes, typographical errors or insignificant matters, such as the specification of details which were implicit in the offer.

160. There was also considerable support for the view that article 13, paragraph (2), should have a broader scope of application than to mere matters of wording and the like, since these matters would, even under the test in article 13, paragraph (1), probably not convert a purported acceptance into a counter-offer. It was stated that as long as the reply did not depart from the substance of the offer, the offeror was sufficiently protected by being given the right to prevent the formation of the contract because of the discrepancy. If a merchant chose not to examine carefully a reply purporting to be an acceptance, the draft Convention should not seek to protect him from his omission to do so.

161. It was suggested by some representatives who opposed the retention of article 13, paragraph (2), that, as a minimum, an attempt should be made to define what would constitute a material alteration of an offer. This would give more certainty to the provision and would make its retention more acceptable.

162. Under another view, the present formulation of article 13, paragraph (2), was preferable as it enabled the determination of what constituted a material alteration to be made having regard to the particular circumstances of each case.

Establishment of a Working Group on article 13

163. The Commission established a Working Group composed of the representatives of Czechoslovakia, Germany, Federal Republic of, Indonesia, Spain and the United Republic of Tanzania. The Working Group was requested to attempt to reformulate article 13, paragraph (2), to clarify what would constitute a material alteration of an offer.

164. The Working Group proposed that article 13, paragraph (2), be deleted or, if it were retained, that the following provision be added as article 13, paragraph (3):

"(3) Additional or different terms relating to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially, unless the offeree, by virtue of the offer or the particular circumstances of the case, has reason to believe they are acceptable to the offeror."

165. In explanation of this proposal it was stated that the Working Group's first preference was the deletion of article 13, paragraph (2), because it contradicted the basic principle of article 13, paragraph (1), that an acceptance must agree with the terms of an offer. It was also extremely difficult to define satisfactorily what constituted a material alteration of the offer.

166. After deliberation, the Commission decided to maintain its previous decision to retain article 13, paragraph (2) (see para. 158 above).

167. Given that article 13, paragraph (2), was retained, it was generally agreed that the additional paragraph proposed by the Work-

ing Group constituted a considerable improvement over the text of the previous article 13, paragraph (2). It was considered that the text proposed by the Working Group should be clarified to indicate that the list of matters, which were defined as constituting a material alteration of an offer, was not exhaustive.

168. One representative stated that the words "unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror" should be deleted, since it was inconceivable that an alteration to any of the matters set out in article 13, paragraph (3) could ever be described as non-material.

169. One representative expressed reservations in respect of the drafting of article 13, paragraph (3). Another representative expressed a reservation as to article 13, paragraph (3).

Requirement of objection "without delay"

170. The Commission adopted a proposal that the words "without delay" be replaced by words such as "without undue delay" to permit the offeror some time for reflection. A representative indicated that, in his view, it was essential to retain the requirement to object without delay, since this accorded with modern commercial practice.

Decision

171. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 13 of this draft Convention became article 17 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 17:

"Article 17"

"(1) A reply to an offer which purports to be an acceptance containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

"(2) However, a reply to an offer which purports to be an acceptance, but which contains additional or different terms which do not materially alter the terms of the offer, constitutes an acceptance unless the offeror objects to the discrepancy without undue delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

"(3) Additional or different terms relating, *inter alia*, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially, unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror."

ARTICLE 14⁹

172. The text of article 14 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

"(2) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of the period for acceptance at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days

⁹ The Commission considered article 14 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 200th meeting on 7 June 1978; a summary record of this meeting is contained in A/CN.9/SR.200.

occurring during the running of the period of time are included in calculating the period."

Paragraph (1)

173. The Commission considered a suggestion that the words "or from the date shown on the letter" be deleted. This suggestion was based on the view that the offeror might insert a date on the letter which did not reflect the date on which the letter was sent. However, the generally accepted view was that a provision along these lines was unnecessary, since it was generally in the interest of the offeror to give the offeree an adequate opportunity to accept.

174. The Commission did not retain a suggestion that article 14, paragraph (1) be simplified by providing that the period of time fixed for acceptance begins to run on receipt of the offer.

Paragraph (2)

175. The Commission did not retain a proposal that official holidays or non-business days occurring during the running of the period of time be excluded when calculating the period.

Decision

176. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 14 of this draft Convention became article 18 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 18:

"Article 18

"(1) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

"(2) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of the period for acceptance at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period."

ARTICLE 15⁸

177. The text of article 15 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or dispatches a notice to that effect.

"(2) If the letter or document containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree orally that he considers his offer as having lapsed or dispatches a notice to that effect."

178. The Commission adopted article 15 in principle.

Decision

179. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 15 of this draft Convention became article 19 of

the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 19:

"Article 19

"(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or dispatches a notice to that effect.

"(2) If the letter or document containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree orally that he considers his offer as having lapsed or dispatches a notice to that effect."

ARTICLE 16⁹

180. The text of article 16 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"An acceptance is withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective."

181. The Commission adopted article 16 in principle.

Decision

182. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 16 of this draft Convention became article 20 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 20:

"Article 20

"An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective."

ARTICLE 17¹

183. The text of article 17 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"A contract of sale is concluded at the moment that an acceptance of an offer is effective in accordance with the provisions of this Convention."

184. The Commission did not accept a suggestion that article 17 provide that the contract of sale be concluded on the date agreed upon by the parties, since the parties were always free to agree on a different rule from that provided by article 17.

185. The Commission adopted article 17 in principle.

Decision

186. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 17 of this draft Convention became article 21 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 21:

"Article 21

"A contract is concluded at the moment when an acceptance of an offer is effective in accordance with the provisions of this Convention."

⁸ The Commission considered article 15 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 200th meeting on 7 June 1978; a summary record of this meeting is contained in A/CN.9/SR.200.

⁹ The Commission considered article 16 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 200th meeting on 7 June 1978; a summary record of this meeting is contained in A/CN.9/SR.200.

¹ The Commission considered article 17 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 200th meeting on 7 June 1978; a summary record of this meeting is contained in A/CN.9/SR.200.

ARTICLE 18^u

187. The text of article 18 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) The contract may be modified or rescinded by the mere agreement of the parties.

"(2) A written contract which contains a provision requiring any modification or rescission to be in writing may not be otherwise modified or rescinded. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

"(3) This article does not apply to the modification or rescission of a contract in so far as it is allowed otherwise than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

Paragraph (1)

188. A suggestion to delete the word "mere" was withdrawn when it was pointed out that the expression "mere agreement" had been used by the Working Group on the International Sale of Goods to make it clear that the common law doctrine of consideration was not applicable to the modification or rescission of a contract.

Paragraph (2)

189. There was support for the view that the first sentence of article 18, paragraph (2), should be retained but that the second sentence should be deleted. It was stated in support of this view that the draft Convention should give effect to a written agreement between the parties that their contract could not be modified or rescinded except in writing. To accomplish this result it would be necessary to delete the provision that a party could be precluded by his conduct from asserting such a provision.

190. There was also support for deleting all of article 18, paragraph (2). In support of this view it was stated that the first sentence of article 18, paragraph (2), contradicted the principle of article 3 that no particular form was necessary to constitute an agreement. It was also stated that the provisions of article 18, paragraph (2), would be difficult to interpret and that it would be better to leave the matter to national law.

191. There was also considerable support for the retention of article 18, paragraph (2) as adopted by the Working Group on the International Sale of Goods since it provided a uniform solution to a very important problem in international trade, that is, the effect of clauses in written contracts which provided that any modification or rescission to the contract must be in writing. It was said that article 18, paragraph (2) provided a just and flexible solution to this common problem.

192. After considerable deliberation the Commission decided to retain the substance of article 18, paragraph (2).

Paragraph (3)

193. The Commission deleted this provision as a consequence of its reformulation of article 3, paragraph (2) (see paragraph 27 above).

Decision

194. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 18 of this draft Convention became article 27 of

the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 27:

"Article 27"

"(1) The contract may be modified or abrogated by the mere agreement of the parties.

"(2) A written contract which contains a provision requiring any modification or abrogation to be in writing may not be otherwise modified or abrogated. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct."

ARTICLE (X)^v

195. The text of article (X) of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods is as follows:

"A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may at the time of signature, ratification or accession make a declaration to the effect that the provisions of this Convention, in so far as they allow the conclusion, modification or rescission of the contract, offer, acceptance or any other indication of intention to be made otherwise than in writing shall not apply if one of the parties has his place of business in the declarant State."

Decision

196. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article (X) of this draft Convention became article (X) of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article (X):

"Article (X)"

"A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may at the time of signature, ratification or accession make a declaration in accordance with article 11 that any provision of article 10, article 27 or Part II of this Convention which allows a contract of sale or its modification or abrogation or any offer, acceptance or other indication of intention to be made in any form other than in writing shall not apply where any party has his place of business in a Contracting State which has made such a declaration."

FINAL CLAUSES

197. A representative stated that the draft final clauses to be prepared by the Secretary-General should contain the following provision:

"This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning the matters covered by this Convention, provided that the seller and buyer have their places of business in States parties to such a convention."

ANNEX II

List of documents before the Commission

[Annex not reproduced; see check list of UNCITRAL documents at the end of this volume.]

^u The Commission considered article 18 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 200th meeting on 7 June 1978 and at its 201st meeting on 8 June 1978; summary records of these meetings are contained in A/CN.9/SR.200 and 201.

^v The Commission considered article (X) of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 208th meeting on 16 June 1978; for the summary record of this meeting, see A/CN.9/SR.208.

B. Drafting history at the eleventh session of UNCITRAL of the draft Convention on Contracts for the International Sale of Goods

1. RELATIONSHIP OF THE CONVENTION ON THE INTERNATIONAL SALE OF GOODS AND THE CONVENTION ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS TO THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS*

1. The rules on scope of application contained in the Convention on the Limitation Period in the International Sale of Goods (the Prescription Convention) differ from those presently contained in the draft Convention on the International Sale of Goods (CISG) and the draft Convention on the Formation of Contracts for the International Sale of Goods (the Formation draft). Most of these differences are matters of drafting but several raise issues of substance.

2. The fact that the scope of application provisions of the Prescription Convention might differ from those contained in a future convention or conventions dealing with the subject-matters encompassed by CISG and the Formation draft was foreseen at the Conference of Plenipotentiaries which adopted the Prescription Convention. The summary records of that Conference reveal a widespread expectation that some type of remedial action would be taken at a future conference of plenipotentiaries.¹ Furthermore, paragraph 2 of article 38 of the Prescription Convention appears to assume that such remedial action would in fact occur.

3. Article 38 of the Prescription Convention provides:

"1. A Contracting State which is a party to an existing convention relating to the international sale of goods may declare, at the time of the deposit of its instrument of ratification or accession, that it will apply this Convention exclusively to contracts of international sale of goods as defined in such existing convention.

"2. Such declaration shall cease to be effective on the first day of the month following the expiration of 12 months after a new convention on the international sale of goods, concluded under the auspices of the United Nations, shall have entered into force."

4. This article was designed to enable States which were, or would become, parties to ULIS to utilize its sphere of application provisions until the revision of ULIS which was being undertaken by the Commission was completed and a new Convention had entered into force.² In explaining a proposal which contained terms similar to those in paragraph 2 of article 38,³ the representative of the Federal Republic of Germany, one of

the co-sponsors, stated that when the final text of the revised ULIS had been adopted "it would be possible to harmonize the sphere of application of the revised ULIS with that of the Convention on Prescription by means of a protocol to the latter".⁴ Although this proposal was rejected by the First Committee,⁵ the plenary adopted a similar proposal of the United Kingdom of Great Britain and Northern Ireland⁶ which became article 38.⁷

5. In view of this drafting history, the Commission may wish to consider requesting the General Assembly to authorize any Conference that might be convened to consider CISG and the Formation draft to prepare a protocol to the Prescription Convention which would bring its scope of application provisions into line with those of any convention or conventions on sales and formation which the Conference might adopt. The Commission might, in that event, wish to request the Secretary-General to prepare an analysis of the differences in scope of application between the Prescription Convention and CISG and the Formation draft as adopted by the Commission and a draft Protocol. This analysis and draft Protocol would be circulated with the other documentation relevant to the Conference of Plenipotentiaries that the General Assembly would convene.

2. PROPOSAL OF AUSTRALIA*

Article 1

Renumber paragraph (b) of article 1 as paragraph (b)(1) and add the following provisions:

"1(b)(2) In cases in which the only question is whether this Convention applies to an offer, it so applies where the rules of private international law lead to the application to the offer of the law of a Contracting State.

"(3) In cases in which the only question is whether this Convention applies to an acceptance, it so applies where the rules of private international law lead to the application to the acceptance of the law of a Contracting State.

"(4) In cases in which the rules of private international law lead to the application of the law of a Contracting State to one or some only of the events which together constitute the formation of a contract under this Convention, the law of the Contracting State applies to all of those events."

* Originally issued as A/CN.9/XI/CRP.2 on 24 May 1978.

¹ See particularly the discussions at the 4th to 6th meetings of the First Committee, *Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods* (United Nations publication, Sales No. E.74.V.8), (hereafter cited as *Official Records*), part two, pp. 147-162.

² See the discussion at the 10th plenary meeting of the Prescription Conference, *Official Records*, pp. 130-132.

³ The text of this proposal is set out in para. 186 of the report of the First Committee, *Official Records*, p. 76. The proposal was as follows:

"1. Any State may, at the time of the deposit of its instrument of ratification or accession, declare that it shall apply this Convention exclusively to contracts of international sale of goods as defined in the Convention relating to A Uniform Law on the International Sale of Goods signed at The Hague on 1 July 1964.

"2. Such declaration shall cease to be effective one year after a new Convention on the International Sale of Goods, concluded under the auspices of the United Nations, shall have entered into force in respect of 20 States."

⁴ *Official Records*, p. 232 (para. 33 of the summary records of the 22nd meeting of the First Committee).

⁵ Report of the First Committee, para. 89 (*Official Records*, p. 76).

⁶ A/CONF.63/L.28 (*Official Records*, p. 97).

⁷ This proposal was discussed and adopted at the 10th plenary meeting by 21 votes to none, with 14 abstentions. In introducing the proposal the representative of the United Kingdom noted that paragraph 1 "contained no specific reference to the 1964 ULIS, since it had become apparent from his consultations with other delegations that that would be unacceptable" (*Official Records*, p. 131).

* Originally issued as A/CN.9/XI/CRP.3 on 30 May 1978.

3. PROPOSAL OF THE WORKING GROUP: BRAZIL, EGYPT, FINLAND, INDIA, UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND UNION OF SOVIET SOCIALIST REPUBLICS*

Article 2

Delete paragraphs (1) and (2) of article 2 and substitute the following:

"(1) The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions."

4. PROPOSAL OF THE UNION OF SOVIET SOCIALIST REPUBLICS**

Article 3

Delete paragraph (2) of article 3 and add the following:

"(2) Paragraph (1) of this article as well as any other provision of this Convention which allows a contract of sale or its modification or rescission or any offer, acceptance or other indication of intention to be made in any other form than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

5. PROPOSAL OF THE WORKING GROUP: AUSTRALIA, BRAZIL, FINLAND, HUNGARY, NIGERIA AND YUGOSLAVIA***

Article 4

(1) For the purposes of this Convention communications and statements by and conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, communications and statements by and conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

6. PROPOSAL OF UNIDROIT†

Article 5

In the course of the formation of the contract the parties must observe the principles of good faith and of international co-operation.

7. PROPOSAL OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND*

Article 8

Insert the following paragraphs before the present paragraph (1):

(...) A contract is concluded when the parties thereto have manifested their mutual agreement to its provisions.

(...) Identical cross offers shall be treated as a manifestation of a mutual agreement binding on an offeror unless he promptly notifies the other offeror that he does not hold himself bound.

8. PROPOSAL OF THE WORKING GROUP: FINLAND, HUNGARY, MEXICO, SINGAPORE, UGANDA AND UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND**

A new article based on article 13 of the draft Convention on the International Sale of Goods should be adopted as follows:

"In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and to observe good faith in international trade."

9. PROPOSAL OF THE WORKING GROUP: AUSTRALIA, BRAZIL, FINLAND, FRANCE, HUNGARY, KENYA, SINGAPORE, UNION OF SOVIET SOCIALIST REPUBLICS AND UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND***

Article 8

Delete paragraph (3) and add to paragraph (1) a new second sentence so that paragraph (1) would read as follows:

"(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price."

10. PROPOSAL OF THE WORKING GROUP: CHILE, GREECE, IRELAND, JAPAN, POLAND, UGANDA AND UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND†

New article

A new article should be adopted to precede article 17, reading as follows:

"A contract of sale is deemed to be formed if there is the mutual assent of the parties to form it, even though it is not possible to establish an offer and an acceptance."

* Originally issued as A/CN.9/XI/CRP.4 on 30 May 1978.

** Originally issued as A/CN.9/XI/CRP.5 on 30 May 1978.

*** Originally issued as A/CN.9/XI/CRP.6 on 31 May 1978.

† Originally issued as A/CN.9/XI/CRP.7 on 31 May 1978.

* Originally issued as A/CN.9/XI/CRP.8 on 1 June 1978.

** Originally issued as A/CN.9/XI/CRP.9 on 2 June 1978.

*** Originally issued as A/CN.9/XI/CRP.10 on 5 June 1978.

† Originally issued as A/CN.9/XI/CRP.11 on 5 June 1978.

11. PROPOSAL OF THE UNITED STATES OF AMERICA*

A new article is proposed as an alternative to that proposed by the Working Group in document A/CN.9/XI/CRP.11,** as follows:

"A contract of sale may be formed by the mutual assent of the parties even though it is not possible to establish an offer and an acceptance."

12. PROPOSAL OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND***

A new article is proposed as an alternative to that proposed by the Working Group in document A/CN.9/XI/CRP.11,† as follows:

"Formation of a contract of sale is not excluded by the fact that the mutual assent of the parties cannot be established by reference to the exchange of offer and acceptance."

13. PROPOSAL OF AUSTRALIA‡

New article; article 15

1. Insert an article to the following effect at the appropriate place in the draft Convention:

"An offer lapses when

"(a) the period fixed by it expires; or

"(b) if no period is fixed, upon expiry of a reasonable time, due account being taken in this regard of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror."

2. Delete article 15.

Note

As to 1, see articles 12 (2) and 14.

14. PROPOSAL OF THE WORKING GROUP: CZECHOSLOVAKIA, GERMANY, FEDERAL REPUBLIC OF, INDONESIA, SPAIN AND UNITED REPUBLIC OF TANZANIA§

The Working Group recommends that paragraph 2 of article 13 be deleted.

If the Commission does not wish to delete paragraph 2, the Working Group recommends the adoption of a new paragraph 3 as follows:

"(3) Additional or different terms relating to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially, unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror."

15. PROPOSAL OF THE WORKING GROUP: FINLAND, GHANA, HUNGARY, JAPAN, KENYA, PHILIPPINES, UNION OF SOVIET SOCIALIST REPUBLICS AND UNITED STATES OF AMERICA*

Article 9

The offer becomes effective when it reaches the offeree. It may be withdrawn before becoming effective if the withdrawal reaches the offeree before or at the same time as the offer even if the offer is irrevocable.

Article 10

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched his acceptance.

(2) However, an offer cannot be revoked:

(a) If the offer indicates that it is irrevocable; or

(b) If the offer states a fixed period of time for acceptance, unless the offer clearly states it is intended to refer only to the termination of the offer or the termination is evident because of the operation of article 2 (2); or

(c) If it was reasonable for the offeree to rely upon the offer as being irrevocable and the offeree has acted in reliance on the offer.

16. REPORT OF THE DRAFTING GROUP: DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS**

PART I. SPHERE OF APPLICATION AND GENERAL PROVISIONS
*Chapter 1. Sphere of application**Article 1*

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) When the States are Contracting States; or

(b) When the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration.

Article 2

This Convention does not apply to sales:

(a) Of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to

* Originally issued as A/CN.9/XI/CRP.12 on 5 June 1978.

** Reproduced in this volume, part one, II, B, 10 above.

*** Originally issued as A/CN.9/XI/CRP.13 on 6 June 1978.

† Reproduced in this volume, part one, II, B, 10 above.

‡ Originally issued as A/CN.9/XI/CRP.14 on 7 June 1978.

§ Originally issued as A/CN.9/XI/CRP.15 on 7 June 1978.

* Originally issued as A/CN.9/XI/CRP.16 on 7 June 1978.

** Originally issued as A/CN.9/XI/CRP.17 on 12 June 1978.

have known that the goods were bought for any such use;

- (b) By auction;
- (c) On execution or otherwise by authority of law;
- (d) Of stocks, shares, investment securities, negotiable instruments or money;
- (e) Of ships, vessels or aircraft;
- (f) Of electricity.

Article 3

(1) This Convention does not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

Article 6

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided therein, this Convention is not concerned with:

- (a) The validity of the contract or of any of its provisions or of any usage;
- (b) The effect which the contract may have on the property in the goods sold.

Article 4

The parties may exclude the application of this Convention or, subject to article 11 A, derogate from or vary the effect of any of its provisions.

Chapter II. General Provisions

Article 13

In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and the observance of good faith in international trade.

Article A* (Formation, article 4)

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to

all relevant circumstances of the case including negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 7

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article B** (Formation, article 7)

For the purposes of this Convention an offer, declaration of acceptance or any other indication of intention or a notice "reaches" the addressee or is "received" by him when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

Article 5

For the purposes of this Convention:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) If a party does not have a place of business, reference is to be made to his habitual residence.

Article 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means including witnesses.

Article C (Formation, article 11 (2))

Any provision of article 11, article N or part II of this Convention which allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any other form than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this article.

PART II. FORMATION OF THE CONTRACT

Article D (Formation, article 8)

(1) A proposal for concluding a contract addressed

* The Drafting Group was of the understanding that the Commission wished article 4 of Formation to be placed in the General Provisions of the Convention so that it would be applicable to the entire Convention.

** The Drafting Group was divided on the question whether article 7 of Formation should be placed in the General Provisions of the Convention or whether it should be in part II dealing with the formation of the contract.

to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Article E (Formation, article 9)

(1) An offer becomes effective when it reaches the offeree.

(2) An offer may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. It may be withdrawn even if it is irrevocable.

Article F (Formation, article 10)

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) If it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) If it was reasonable for the offeree to rely upon the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article G (Formation, article 11)

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Article H (Formation, article 12)

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence shall not in itself amount to acceptance.

(2) Subject to paragraph 3 of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed provided that the act is performed within the period of time laid down in paragraph 2 of this article.

Article I (Formation, article 13)

(1) A reply to an offer which purports to be an

acceptance containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without undue delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, *inter alia*, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially, unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror.

Article J (Formation, article 14)

(1) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of the period for acceptance at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

Article K (Formation, article 15)

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or dispatches a notice to that effect.

(2) If the letter or document containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree orally that he considers his offer as having lapsed or dispatches a notice to that effect.

Article L (Formation, article 16)

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article M (Formation, article 17)

A contract is concluded at the moment when an acceptance of an offer is effective in accordance with the provisions of this Convention.

PART III. SALE OF GOODS

*Chapter I. General provisions**Article 8*

A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such a result.

Article 9

A declaration of avoidance of the contract is effective only if made by notice to the other party.

Article 10

Unless otherwise expressly provided in this part, if any notice, request or other communication is given by a party in accordance with this Convention and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

Article 12

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention.

Article N (Formation, article 18)

(1) The contract may be modified or abrogated by the mere agreement of the parties.

(2) A written contract which contains a provision requiring any modification or abrogation to be in writing may not be otherwise modified or abrogated. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

*Chapter II. Obligations of the seller**Article 14*

The seller must deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and this Convention.

*Section I. Delivery of the goods and handing over of documents**Article 15*

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) If the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer;

(b) If, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or

to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place;

(c) In other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 16

(1) If the seller is bound to hand the goods over to a carrier and if the goods are not clearly marked with an address or are not otherwise identified to the contract, the seller must send the buyer a notice of the consignment which specifies the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transportation which are appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must provide the buyer, at his request, with all available information necessary to enable him to effect such insurance.

Article 17

The seller must deliver the goods:

(a) If a date is fixed by or determinable from the contract, on that date; or

(b) If a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) In any other case, within a reasonable time after the conclusion of the contract.

Article 18

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract.

*Section II. Conformity of the goods and third party claims**Article 19*

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they:

(a) Are fit for the purposes for which goods of the same description would ordinarily be used;

(b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) Are contained or packaged in the manner usual for such goods.

(2) The seller is not liable under subparagraphs (a) to (d) of paragraph (1) of this article for any non-conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity.

Article 20

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and which is due to a breach of any of his obligations, including a breach of any express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific period.

Article 21

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. The buyer retains any right to claim damages as provided for in this Convention.

Article 22

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redispach, examination may be deferred until after the goods have arrived at the new destination.

Article 23

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless such time-limit is inconsistent with a contractual period of guarantee.

Article 24

The seller is not entitled to rely on the provisions of articles 22 and 23 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 25

(1) The seller must deliver goods which are free from any right or claim of a third party, other than one based on industrial or intellectual property, unless the buyer agreed to take the goods subject to that right or claim.

(2) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim.

Article 26

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial or intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that that right or claim is based on industrial or intellectual property:

(a) Under the law of the State where the goods will be resold or otherwise used if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) In any other case under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under paragraph (1) of this article does not extend to cases where:

(a) At the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) The right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

(3) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim.

Section III. Remedies for breach of contract by the seller

Article 27

(1) If the seller fails to perform any of his obligations under the contract and this Convention, the buyer may:

(a) Exercise the rights provided in articles 28 to 34;

(b) Claim damages as provided in articles 56 to 59.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller

by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Article 28

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with such requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice given under article 23 or within a reasonable time thereafter.

Article 29

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in the performance.

Article 30

(1) Unless the buyer has declared the contract avoided in accordance with article 31, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under paragraph (2) of this article, that the buyer make known his decision.

(4) A request or notice by the seller under paragraphs (2) and (3) of this article is not effective unless received by the buyer.

Article 31

(1) The buyer may declare the contract avoided:

(a) If the failure by the seller to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

(b) If the seller has not delivered the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 29 or has declared that he will not deliver within the period so fixed.

(2) However, in cases where the seller has made delivery, the buyer loses his right to declare the con-

tract avoided unless he has done so within a reasonable time:

(a) In respect of late delivery, after he has become aware that delivery has been made; or

(b) In respect of any breach other than late delivery, after he knew or ought to have known of such breach, or after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 29, or after the seller has declared that he will not perform his obligations within such an additional period.

Article 32

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion as the value that the goods actually delivered would have had at the time of the conclusion of the contract bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 30 or if he is not allowed by the buyer to remedy that failure in accordance with that article, the buyer's declaration of reduction of the price is of no effect.

Article 33

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, the provisions of articles 28 to 32 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Article 34

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

Chapter III. Obligations of the buyer

Article 35

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Section I. Payment of the price

Article 36

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any relevant laws and regulations to enable payment to be made.

Article 37

If a contract has been validly concluded but does not state the price or expressly or impliedly make provision for the determination of the price of the goods, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.

Article 38

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

Article 39

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

- (a) At the seller's place of business; or
- (b) If the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in the place of business of the seller subsequent to the conclusion of the contract.

Article 40

(1) The buyer must pay the price when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

Article 41

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or other formality on the part of the seller.

Section II. Taking delivery

Article 42

The buyer's obligation to take delivery consists:

- (a) In doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
- (b) In taking over the goods.

Section III. Remedies for breach of contract by the buyer

Article 43

(1) If the buyer fails to perform any of his obligations under the contract and this Convention, the seller may:

- (a) Exercise the rights provided in articles 44 to 47;
- (b) Claim damages as provided in articles 56 to 59.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

Article 44

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with such requirement.

Article 45

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in the performance.

Article 46

(1) The seller may declare the contract avoided:

- (a) If the failure by the buyer to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or
- (b) If the buyer has not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 45, performed his obligation to pay the price or taken delivery of the goods, or if he has declared that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses his right to declare the contract avoided if he has not done so:

(a) In respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) In respect of any breach other than late performance, within a reasonable time after he knew or ought to have known of such breach, or within a reasonable time after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 45 or the declaration by the buyer that he will not perform his obligations within such an additional period.

Article 47

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of

a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with any requirement of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If the buyer fails to do so after receipt of such a communication, the specification made by the seller is binding.

Chapter IV. Provisions common to the obligations of the seller and of the buyer

Section I. Anticipatory breach and instalment contracts

Article 48

(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the ability to perform or in the creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract gives good grounds to conclude that the other party will not perform a substantial part of his obligations.

(2) If the seller has already dispatched the goods before the grounds described in paragraph (1) of this article become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice to the other party thereof and must continue with performance if the other party provides adequate assurance of his performance.

Article 49

If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided.

Article 50

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach will occur with respect to future instalments, he may declare the contract avoided for the future, provided he does so within a reasonable time.

(3) A buyer, avoiding the contract in respect of any delivery, may, at the same time, declare the contract avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Section II. Exemptions

Article 51

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if he is exempt under paragraph (1) of this article and if the person whom he has engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect only for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Section III. Effects of avoidance

Article 52

(1) Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. Avoidance does not affect any provisions of the contract for the settlement of disputes or any other provisions of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract.

(2) If one party has performed the contract either wholly or in part, he may claim from the other party restitution of whatever he has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 53

(1) The buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) Paragraph (1) of this article does not apply:

(a) If the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which he received them is not due to an act or omission of the buyer; or

(b) If the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 22; or

(c) If the goods or part of the goods have been sold in the normal course of business or have been con-

sumed or transformed by the buyer in the course of normal use before he discovered the lack of conformity or ought to have discovered it.

Article 54

The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 53 retains all other remedies.

Article 55

(1) If the seller is bound to refund the price, he must also pay interest thereon from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) If he must make restitution of the goods or part of them; or

(b) If it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

Section IV. Damages

Article 56

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 57

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction and any further damages recoverable under the provisions of article 56.

Article 58

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 57, recover the difference between the price fixed by the contract and the current price at the time he first had the right to declare the contract avoided and any further damages recoverable under the provisions of article 56.

(2) For the purposes of paragraph (1) of this article, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 59

The party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated.

Section V. Preservation of the goods

Article 60

If the buyer is in delay in taking delivery of the goods and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 61

(1) If the goods have been received by the buyer and he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination.

Article 62

The party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 63

(1) The party who is bound to preserve the goods in accordance with articles 60 or 61 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation, provided that notice of the intention to sell has been given to the other party.

(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party who is bound to preserve the goods in accordance with articles 60 or 61 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) The party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

*Chapter V. Passing of risk**Article 64*

Loss or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 65

(1) If the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular destination, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. If the seller is required to hand the goods over to a carrier at a particular place other than the destination, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of risk.

(2) Nevertheless, if the goods are not clearly marked with an address or otherwise identified to the contract, the risk does not pass to the buyer until the seller sends the buyer a notice of the consignment which specifies the goods.

Article 66

The risk in respect of goods sold in transit is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents controlling their disposition. However, if at the time of the conclusion of the contract the seller knew or ought to have known that the goods had been lost or damaged and he has not disclosed such fact to the buyer, such loss or damage is at the risk of the seller.

Article 67

(1) In cases not covered by articles 65 and 66 the risk passes to the buyer when the goods are taken over by him or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) If, however, the buyer is required to take over the goods at a place other than any place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to a sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer until they have been clearly identified to the contract.

Article 68

If the seller has committed a fundamental breach of contract, the provisions of articles 65, 66 and 67 do not impair the remedies available to the buyer on account of such breach.

Article (X)

A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may at the time of signature, ratification or accession make a declaration in accordance with article 11A that any provision of article 11, article ____ or Part II of this Convention which allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any other form than in writing shall not apply where any party has his place of business in a Contracting State which has made such a declaration.

C. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document symbol</i>
United Nations Conference on the Carriage of Goods by Sea; note by the Secretary-General	A/CN.9/150
Training and assistance in the field of international trade law; note by the Secretary-General	A/CN.9/152
Provisional agenda, annotations thereto, and tentative schedule of meetings; note by the Secretary-General	A/CN.9/153
Co-ordination of work between the Commission and other international organizations; note by the Secretary-General	A/CN.9/154

I. INTERNATIONAL SALE OF GOODS

A. Report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977) (A/CN.9/142)*

CONTENTS

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I. INTRODUCTION

1. The Working Group on the International Sale of Goods was established at the second session of the United Nations Commission on International Trade Law. At that session, the Commission requested the Working Group, *inter alia*, to ascertain which modifications of the Hague Convention of 1964 relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods might render it capable of wider acceptance by countries of different legal, social and economic systems and to elaborate a new text reflecting such modifications.¹ At its third session the Commission decided that the Working Group should commence its work on formation of contracts when it had completed its work on the revision of the Uniform Law on the International Sale of Goods.²

2. The Working Group is currently composed of the following States members of the Commission: Austria, Brazil, Czechoslovakia, France, Ghana, Hungary, India, Japan, Kenya, Mexico, Philippines, Sierra Leone, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and the United States of America.

3. The Working Group held its ninth session at the United Nations Office in Geneva from 19 to 30 September 1977. All members of the Working Group were represented except Kenya and Sierra Leone.

4. The session was also attended by observers from the following members of the Commission: Argentina, Australia, Bulgaria, Finland, German Democratic Republic, and Germany, Federal Republic of.

5. Observers from Guatemala, Iran, Iraq, Malaysia, Netherlands, Oman and Turkey also attended the session. In addition the session was attended by observers from the following international organizations: Hague Conference on Private International Law, International Institute for the Unification of Private Law (UNIDROIT) and International Chamber of Commerce.

6. The Working Group elected the following officers:

* 6 January 1978.

¹ UNCITRAL, report on the second session (1969), A/7618 (Yearbook . . . 1968-1970, part two, II, A).

² UNCITRAL, report on the third session (1970), A/8017 (Yearbook . . . 1968-1970, part two, III, A).

Chairman Mr. Jorge Barrera-Graf (Mexico)

Rapporteur Mr. Gyula Eörsi (Hungary)

7. The following documents were placed before the Working Group:

(a) Provisional agenda and annotations (A/CN.9/WG.2/L.4);

(b) Report of the Secretary-General: draft commentary on articles 1 to 13 of the draft Convention on the Formation of Contracts for the International Sale of Goods as approved or deferred for further consideration by the Working Group on the International Sale of Goods at its eighth session (A/CN.9/WG.2/WP.27);**

(c) Report of the Secretary-General: analysis of unresolved matters in respect of the formation and validity of contracts for the international sale of goods (A/CN.9/WG.2/WP.28);**

(d) Note by the Secretary-General: observations of representatives on the draft of a uniform law for the unification of certain rules relating to validity of contracts of international sale of goods (A/CN.9/WG.2/WP.29);**

(e) Note by the Secretary-General: observations of the German Democratic Republic (A/CN.9/WG.2/WP.30).**

8. The Working Group adopted the following agenda:

(a) Opening of the session

(b) Election of officers

(c) Adoption of the agenda

(d) Formation and validity of contracts for the international sale of goods

(e) Date of the next session

(f) Adoption of the report of the session.

9. In the discussion of item (d) of the agenda the Working Group decided, firstly, to consider the rules relating to interpretation contained in article 14 of the draft Convention on the formation of contracts for the international sale of goods as approved or deferred for further consideration by the Working Group at its eighth session,³ secondly, to consider the possible inclusion in the draft Convention of certain rules relating

** Documents A/CN.9/WG.2/WP.27 to 30 are reproduced in the present volume, part two, I, B.

³ A/CN.9/128, annex I (Yearbook . . . 1977, part two, I, B).

to validity of contracts and, thirdly, to complete its work on the preparation of rules relating to the formation of contracts for the international sale of goods.

10. The Working Group created a Drafting Group consisting of the representatives of France, Ghana, Mexico, Union of Soviet Socialist Republics and United Kingdom of Great Britain and Northern Ireland to consider drafting suggestions which had been made during the deliberations on the various articles, to assure consistency of drafting in the provisions of this Convention and with the draft Convention on the International Sale of Goods (hereinafter referred to as CISG), to assure consistency in the four language versions, and to propose a new arrangement of the articles. The Working Group invited other representatives and observers to attend meetings of the Drafting Group.

II. DELIBERATIONS AND DECISIONS

A. Rules relating to interpretation

11. The text of article 14 as adopted by the Working Group at its eighth session was as follows:

"Article 14

"(1) [Communications, statements and declarations by and acts of] the parties are to be interpreted according to their actual common intent where such an intent can be established.

"(2) If the actual common intent of the parties cannot be established, [communications, statements and declarations by and acts of] the parties are to be interpreted according to the intent of one of the parties, where such an intent can be established and the other party knew or ought to have known what that intent was.

"(3) If neither of the preceding paragraphs is applicable, [communications, statements and declarations by and acts of the parties] are to be interpreted according to the intent that reasonable persons would have had in the same circumstances.

"(4) The intent of the parties or the intent a reasonable person would have had in the same circumstances or the duration of any time-limit or the application of article 11 [may] [is to] be determined in the light of the circumstances of the case including the [preliminary] negotiations, any practices which the parties have established between themselves, any conduct of the parties subsequent to the conclusion of the contract, usages [of which the parties knew or had reason to know and which in international trade are widely known to, and regularly observed by parties to contracts of the type involved in the particular trade concerned]."

Article 14 in general

12. The Working Group considered whether the rules on interpretation contained in this draft Convention should be confined to interpreting the unilateral acts and statements of the parties, such as the offer and the acceptance, for the purpose of determining whether a contract has been concluded or whether the rules on interpretation should be extended to regulate the interpretation of contracts which have been concluded.

13. Under one view it was better to formulate gen-

eral rules on interpretation, since it was artificial to distinguish between the interpretation of the communications which led to a contract and the interpretation of the contract which had been formed as a result of these communications. It was also considered that it would be undesirable to prescribe rules of interpretation in relation to formation and then leave the question of the interpretation of the contract to national law which may contain different rules. It was stated that interpretation in relation to formation and interpretation of the contract should be governed by the same rules because both require the establishment of the meaning of the same communications, statements, declarations and acts. In addition, it was noted that the draft Convention on Formation and CISG may eventually be combined into one instrument, in which case it would be inappropriate to limit the rules on interpretation to questions of formation.

14. However, there was considerable support for the contrary view that the rules of interpretation should be limited to determining whether a contract had been concluded. It was stated that the rules on interpretation of contracts were too complex to be set out adequately in the proposed Convention.

15. In addition, following the decision discussed in paragraphs 48 to 69 below not to include any of the provisions on validity of contracts from the draft of a Law for the Unification of Certain Rules relating to Validity of Contracts of International Sale of Goods which had been prepared by UNIDROIT, the entire text of the Convention would be limited to questions of formation of contract. Therefore, it was stated, it would be inappropriate to include provisions on the interpretation of contracts in this Convention.

16. The Working Group decided that the rules on interpretation should be limited to interpreting the unilateral acts and statements of the parties for the purpose of determining whether a contract had been concluded. At the same time it decided to append a foot-note to the text of the draft Convention noting that no similar rules on interpretation of the contract exist in the draft CISG.

Article 14 (1)

17. Under one view article 14 (1) was unnecessary because if there was an actual common intent of the parties, this intent would obviously be the interpretation of their statements and actions. Furthermore, if they had no actual common intent, it was hard to conceive of a court imposing a contract on the parties. In addition, it was noted that the rule in article 14 (2) would lead to the same result as that achieved by article 14 (1) for, if there was an actual common intent, each party would in fact know the intent of the other party. Accordingly, article 14 (1) was superfluous and could be deleted. It was also pointed out that the deletion of article 14 (1) would not prejudice a later decision to extend the rules of interpretation to interpretation of the contract since article 14 (2), which would become the primary rule of interpretation, was equally applicable to interpretation for the purposes of determining whether a contract had been concluded and to the interpretation of the contract.

18. The deletion of article 14 (1) was also favoured by some of those representatives who were of the view that the rules on interpretation should be limited to matters of formation since, in their view, the text in

article 14 (1) appeared to encompass questions of interpretation of the contract.

19. Support for the retention of article 14 (1) was founded on the view that it was useful to set out specifically the basic statement of principle that it contained. Furthermore, the rule might be useful in cases where a number of communications were involved in the formation process with the result that there may be actual common intent on some but not all the points contained in the communications. It was also pointed out that, although the application of article 14 (2) would usually result in the same conclusion as that achieved by article 14 (1), this would not always be the case, e.g. where each party knew of the other party's intent but where those intents differed.

20. The Working Group, after considering these points of view, decided to delete article 14 (1).

Combination of articles 14 (2), 14 (3) and 14 (4)

21. The Working Group considered two proposals to combine the provisions of the remaining three paragraphs. By one proposal articles 14 (2) and 14 (3) would have been combined. By the other proposal articles 14 (3) and 14 (4) would have been combined.

22. The proposal to combine articles 14 (2) and 14 (3) was intended to make the intent of a party also relevant where the other party did not know or could not be expected to know of that intent. The Working Group did not adopt this proposal as it was generally considered that article 14 (3) protected the other party where the party responsible for the communication, statement, declaration or act did not communicate his true intent. The later replacement of "intent" by "understanding" in article 14 (3) reinforced this decision not to merge the provisions. (See para. 28 below.)

23. The Working Group rejected a proposal to combine articles 14 (3) and 14 (4). This proposal would have eliminated as a means of interpreting the communications, statements and declarations by and acts of the parties any reference to the understanding a reasonable person would have had in the same circumstances. It was considered, however, that article 14 (3) served a useful function when it was not possible to determine the intent one party had or when the other party did not know of that intent under article 14 (2).

Article 14 (2)

Acts of the parties

24. During the course of deliberations on article 14 (1) it was suggested that "communications, statements and declarations" could be deleted from article 14 as they are covered by the word "acts". On the other hand a number of representatives questioned the use of the expression "acts of the parties" which appeared in the first three paragraphs of article 14. It was considered that the word "acts" might be misleading in some legal systems as it might be interpreted to refer only to legal acts, i.e. acts with legal consequences. The Drafting Group was requested to find a more suitable word such as "conduct" which would more closely conform to the word "*comportement*" in the French text.

Elimination of plural tense

25. The Working Group decided that article 14 (2) should refer to the "intent of a party" rather than to the

"intent of the parties". This would avoid the possible problem of selecting which party's intent was governing.

Intent of the parties

26. As a consequence of its decision to delete article 14 (1) the Working Group deleted the expression "[i]f the actual common intent of the parties cannot be established".

27. The Working Group also deleted the expression "where such an intent can be established" as redundant since it was necessarily the case that, if an intent could not be established, it could not be taken into account.

Article 14 (3)

28. The Working Group decided to replace the word "intent" in the English text by the word "understanding". The present English text was ambiguous in that it appeared to introduce notions of what intentions a reasonable person would have had rather than what his understanding of the communications between the parties would have been. It was noted that the word "*sens*" in the French text, which was the text in which the provision was originally drafted, had the desired meaning.

29. The Working Group did not adopt a proposal to define the concept of a "reasonable person" as most representatives considered this a satisfactory standard. However, some representatives expressed the opinion that the notion of a "reasonable person" was vague and should be replaced. The suggestion that the reasonable person should be qualified as a reasonable person "in that trade" found no support.

Article 14 (4)

Matters in square brackets

30. The Working Group made the application of the tests in article 14 (4) obligatory by utilizing the expression "is to be determined" instead of "may be determined".

31. The Working Group deleted the word "preliminary" so that all negotiations would be relevant in determining the intent of the parties or the understanding that a reasonable person would have had in the same circumstances.

32. The Working Group also deleted the definition of "usages" contained in article 14 (4) as the concept of "usages" was already defined in article 13.

Duration of time-limits and application of article 11

33. The Working Group deleted the words "or the duration of any time-limit or the application of article 11". This decision was based upon the view that although the tests in article 14 (4) were appropriate to determine the intent of the parties or the understanding of a reasonable person in the same circumstances as the parties they were not appropriate to assist in the interpretation of provisions of the draft Convention.

34. One representative suggested that it would be desirable to include in the draft Convention a provision on interpretation of the Convention such as that contained in article 13 of CISG. The Working Group decided to examine this suggestion during its deliberations on the first 13 articles of the draft Convention.

Utilization of usages to determine intent or understanding

35. The Working Group considered a proposal that the word "usages" be deleted from article 14 (4) but that the draft Convention contain a provision that communications, statements and declarations by and acts of the parties be interpreted in the way that those expressions and acts would be interpreted in the trade concerned. This proposal was based on the view that usages were appropriate in determining the rights and duties of the parties to a contract but were less appropriate for the determination of their intent or the understanding of a reasonable person in the same circumstances as the parties. Furthermore, it was noted that usages might be used to introduce a term where the parties had been silent, which was not appropriate as a means of determining the actual intent of the parties.

36. The Working Group, after considerable discussion, decided not to adopt this proposal since CISG recognized that usages, as there defined, are a part of the contract and that they may be helpful in determining the intention of the parties or the understanding that reasonable persons in the same circumstances as the parties would have had.

Intent of the parties

37. Under one view the tests in article 14 (4) were not appropriate to determine the actual subjective intent of the parties. Accordingly, it was suggested that the provision be limited to the understanding that reasonable persons in the same situation as the parties would have had.

38. However, another view was that there could be uncertainty as to the actual subjective intent of the parties and that this uncertainty might be resolved in some cases by usages or by the practices established between or the conduct of the parties.

39. After deliberation, the Working Group decided to maintain the application of the tests in article 14 (4) to determine the intent of the parties.

Conduct subsequent to the conclusion of the contract

40. There was considerable support for the view that utilization of conduct subsequent to the conclusion of the contract should not be relevant in determining the intent of the parties or the understanding that a reasonable person would have had in the same circumstances for the purpose of determining whether a contract had been concluded. However, the reasons for this support varied. One approach was that utilization of subsequent conduct could result in a contract having one meaning at the time of its conclusion and another meaning subsequent to the time of its conclusion. It was also noted that it was inconsistent to refer to "conduct of the parties subsequent to the conclusion of the contract" for the purpose of determining whether there was a contract. The provision seemed to assume the existence of that which it was attempting to aid in determining.

41. However, there was also strong support for the view that subsequent conduct was relevant for questions of interpretation and that it would be unrealistic to exclude it.

Reservations in respect of article 14

42. A representative and an observer expressed a

reservation in respect of article 14. The representative noted that the words "a party" in article 14 (3) should be in the plural because the interpretation of the statements and acts of one party must always be made in the light of the statements and acts of the other party.

Relationship to CISG

43. The Working Group decided to append a footnote to the text of the draft Convention noting that there was no provision in CISG equivalent to the article on interpretation which had now been included in the draft Convention on Formation of Contracts for the International Sale of Goods.⁴

Additional proposal relating to article 14

44. After the Working Group had completed its discussion of article 14 (see above, paras. 11 to 44), an observer introduced a proposal that paragraphs (1) and (2) of article 14 read as follows:

"(1) Communications, statements and declarations by and acts of a party shall be interpreted according to the meaning usually given to them in the trade concerned, or where no such particular meaning is given to them in the trade concerned, according to their ordinary meaning. However, if another but common [alternatively: 'mutual' or 'joint'] intent of the parties can be established, such common intent shall prevail.

"(2) A party may not rely on such usual or ordinary meaning as said in paragraph (1), if he knew or could not have been unaware of [alternatively: or ought to have known] that the other party understood such communication, statement, declaration or act differently."

45. The observer stated that interpretation of offers and acceptances could, by necessity, not be different from interpretation of the contract and that therefore any attempt to restrict the proposed rules to "formation" of the contract would be in vain. The observer argued that the basic approach to interpretation should be an objective one.

46. The Working Group noted this proposal but declined to reconsider its decisions in respect of article 14.

Decision

47. The Working Group adopted the following text of article 14 (which was later renumbered as article 4):

"(1) Communications, statements and declarations by and conduct of a party are to be interpreted according to his intent where the other party knew or ought to have known what that intent was.

"(2) If the preceding paragraph is not applicable, communications, statements and declarations by and conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

"(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

⁴ The foot-note to the article (foot-note a) is set out in the annex to the present report.

B. Rules relating to validity

48. The Working Group at its eighth session noted the view expressed at the ninth session of the Commission that "the Working Group should restrict its work to the preparation of rules on the formation of contracts for the international sale of goods so as to complete its task in the shortest possible time, but that the Working Group had discretion as to whether to include some rules in respect of the validity of such contracts."⁵

49. The Working Group at its eighth session decided that at its ninth session it should determine which rules on validity of contracts of international sale of goods should be included in the draft Convention. In preparation of that session the Secretariat was requested to analyse the draft of a Law for the Unification of Certain Rules relating to Validity of Contracts of International Sale of Goods (hereafter referred to as LUV) prepared by UNIDROIT and to suggest what matters covered by that text as well as what other matters of validity of contracts should be included in the draft Convention.⁶

50. The Working Group examined the problem of validity in the context of the analysis contained in the report of the Secretary-General (A/CN.9/WG.2/WP.28) which examined LUV and in the light of the observations of the representative of the United Kingdom (A/CN.9/WG.2/WP.29) and of the German Democratic Republic (A/CN.9/WG.2/WP.30).

51. The report of the Secretary-General suggested that, other than articles 3, 4 and 5 of LUV, which related to interpretation and which had been incorporated into article 14 of this draft Convention, the Working Group should consider for inclusion in the draft Convention only articles 9 and 16.⁷

(1) *Proposals relating to the doctrine of mistake*

(a) *Possible inclusion of article 6 of LUV in draft Convention*

52. Article 6 of LUV is as follows:

"A party may only avoid a contract for mistake if the following conditions are fulfilled at the time of the conclusion of the contract:

"(a) The mistake is, in accordance with the above principles of interpretation, of such importance that the contract would not have been concluded on the same terms if the truth had been known; and

"(b) The mistake does not relate to a matter in regard to which, in all the relevant circumstances, the risk of mistake was expressly or impliedly assumed by the party claiming avoidance; and

"(c) The other party has made the same mistake, or has caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error."

Article 6 (a) of LUV

53. Under one view article 6 (a) should be included

⁵ Report of the Working Group on the International Sale of Goods on the work of its eighth session, A/CN.9/128, para. 8 (Yearbook... 1977, part two, I. A).

⁶ *Ibid.*, paras. 173 and 174.

⁷ Report of the Secretary-General: analysis of unresolved matters in respect of the formation and validity of contracts for the international sale of goods (A/CN.9/WG.2/WP.28, para. 44).

in the draft Convention because it provided a useful rule which was found in a number of legal systems. In the view of those supporting the provision it was designed to operate only in cases where the mistake was of "importance". It was suggested that an appropriate redrafting of the provision would make this limitation clearer. In addition, it was stated, possible abuse of the provision was prevented by article 14 (4) of LUV which provides, *inter alia*, that if "the mistake was at least in part the fault of the mistaken party, the other party may obtain damages from the party who has avoided the contract."

54. However, there was general opposition to the retention of this provision. It was considered to be unacceptably broad in its application since it appeared to provide that a party could avoid a contract for mistake even if the mistake would lead reasonable persons to make only minor modifications to the terms of the contract. It was also pointed out that even if the test were reformulated to include only important mistakes, it was very unlikely that a uniform body of interpretation would develop since concepts such as an "important mistake", or the like, depended upon value judgements which would vary widely. It was also pointed out that while a formulation such as that contained in article 6 (a) could operate satisfactorily in those legal systems which had a similar rule and consequently had the appropriate background in case law and doctrine to interpret the article, the formulation would not work as well in those legal systems which did not recognize such a rule. It could be expected that in those legal systems there would be widely varying interpretations of the provision.

55. After considerable deliberation the Working Group decided not to include a provision based on article 6 (a) of LUV in the draft Convention.

Article 6 (b) of LUV

56. There was some support for the inclusion of a provision based on article 6 (b) of LUV. This support was based on the view that the article provided a useful rule where there was a mistake but the circumstances indicated that the person claiming avoidance had assumed the risk of such a mistake. In addition, it was pointed out that as the article was framed negatively it would be possible to include it in the draft Convention even if the draft Convention did not include a complete provision on mistake.

57. However, most representatives considered that this provision should not be incorporated into the draft Convention for the same general reasons as led to the decision not to adopt a provision based on article 6 (a).

58. The Working Group accordingly decided not to adopt a provision based on article 6 (b) of LUV.

Article 6 (c) of LUV

59. There was no support for the adoption of a provision based on article 6 (c) of LUV.

(b) *Possible inclusion of article 8 of LUV in draft Convention*

60. Article 8 of LUV provides:

"A mistake shall not be taken into consideration when it relates to a fact arising after the contract has been concluded."

61. There was some support for this provision on the basis that it would rightly deny a party the right to avoid the contract for mistake where his mistake consisted of an evaluation as to future events.

62. However, most representatives were of the view that it would not be useful for the draft Convention to contain a provision based on this article once it was decided not to retain article 6 of LUV. It was thought not to be appropriate to negate in the draft Convention one aspect of what might constitute mistake if the basic concept of mistake was left to national law. It was also suggested that, in any case, the rule as presently contained in article 8 was too broad.

63. The Working Group accordingly decided not to include a provision based on article 8 of LUV in the draft Convention.

(c) *Possible inclusion of article 9 of LUV in draft Convention*

64. Article 9 of LUV provides:

"The buyer shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford him a remedy based on the non-conformity of the goods with the contract or on the existence of rights of third parties in the goods."

65. This provision was generally considered inappropriate for inclusion in the draft Convention. The reasons for this view varied. One approach was that it was undesirable to limit the right that national law might give to avoid contracts on the basis of mistake merely because there was a remedy available based on non-conformity of the goods under the substantive law of sales. Compelling the buyer to rely on such remedy based on non-conformity might in some circumstances unjustifiably deprive the buyer of the right to avoid the contract. Another view was that the article was unnecessary because, if goods did not conform to the contract, it was clear that any remedy must be based on non-conformity whereas if there was a mistake in making the specification, any claim concerning the supply of inappropriate goods would be based on mistake. It was also pointed out that, since there was no assurance that a State which adhered to this Convention would also adhere to CISG, this article could not give assurance that a party would have the remedies available to him under that Convention, even though this seemed to be its main purpose.

66. In view of these considerations the Working Group decided not to include a provision based on article 9 of LUV in the draft Convention.

(d) *Possible inclusion of article 16 of LUV in the draft Convention*

67. Article 16 of LUV provides:

"1. The fact that the performance of the assumed obligation was impossible at the time of the conclusion of the contract shall not affect the validity of the contract, nor shall it permit its avoidance for mistake.

"2. The same rule shall apply in the case of a sale of goods that do not belong to the seller."

68. Some representatives expressed support for the adoption of article 16.

69. However, the Working Group decided not to include such a provision in the draft Convention because no other provisions on mistake had been adopted and there was no compelling reason to make an exception in this case.

(2) *Proposals relating to good faith and fair dealing*

70. During the eighth session of the Working Group the representative of Hungary submitted paragraphs I and II of the proposal set out below, the consideration of which was deferred by the Working Group to its ninth session.⁸ The German Democratic Republic suggested that a third paragraph be added to the proposal of Hungary.⁹ The composite text reads as follows:

"I

"In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith. [Conduct violating these principles is devoid of any legal protection.]

"II

"The exclusion of liability for damage caused intentionally or with gross negligence is void.

"III

"In case a party violates the duties of care customary in the preparation and formation of a contract of sale, the other party may claim compensation for the costs borne by it."

The general concept of provisions on good faith and fair dealing.

71. The general concept that the draft Convention should contain provisions relating to good faith and fair dealing was supported by a majority of the representatives. It was pointed out that such principles are expressly stated in many national laws and codes and that it was thus appropriate that similar provisions be found in international conventions. It was also pointed out that provisions on good faith and fair dealing contained in national laws had in some legal systems become useful regulators of commercial conduct. It was suggested that, over time, the same process may occur on an international level, particularly if national jurisprudence and doctrine were used to assist in the interpretation of such provisions in the draft Convention.

72. Although the majority of the representatives were in favour of including a provision on good faith and fair dealing in the Convention, there was considerable opposition to the specific formulation of each paragraph of the proposed text.

Paragraph I

73. Paragraph I was supported on the basis that it incorporated a desirable standard of business conduct in the process of formation of contracts, a standard which was recognized and codified in many legal systems and there was no reason for not having a similar rule in international trade. Although there might be difficulty, in particular in the beginning, in obtaining a uniform interpretation of this provision in all legal systems, this would not be worse than the situation that

⁸ A/CN.9/WG.2/WP.28, para. 60. The representative of Hungary explained that the second sentence of paragraph I was put in square brackets as informal consultations had indicated opposition to the sentence from some representatives who were prepared to support the first sentence.

⁹ A/CN.9/WG.2/WP.29, annex, para. 3.

prevailed in national laws after such kinds of general clauses were enacted. The existence of a uniform text might encourage future uniformity of interpretation of such matters.

74. On the other hand it was noted that the general principle enunciated in the first sentence would not have much effect until it had been judicially interpreted and applied over a long period of time. In addition, the view was expressed that the sentence was too vague and imprecise. In particular, one representative noted that as it would be difficult to enumerate "the" principles of fair dealing it might be preferable to refer to "principles of fair dealing". It was also stated that countries which gave internal effect to treaties by enabling legislation might leave out the provision on the basis that the provision did not add anything to national law.

75. The second sentence failed to attract widespread support, largely because it was considered to provide vague and unclear standards which would be unlikely to receive a uniform interpretation.

76. One representative was opposed to the entire first paragraph because it contained vague rules whose meaning would depend upon value judgements which would vary greatly.

77. After considerable deliberation, the Working Group decided to adopt the first sentence of paragraph I. One representative expressed a reservation in respect of this decision. The Working Group deleted the second sentence of the paragraph.

Relationship to CISG

78. The Working Group decided to append a footnote to the text of the draft Convention noting that there was no provision in CISG equivalent to the first sentence of paragraph I which has now been included in this Convention.

Paragraph II

79. Under one view paragraph II should be retained because it provided a safeguard, albeit a minimum one, against unilaterally imposed exemption clauses by placing a limit well known to many national laws on the allowable extent of such clauses.

80. However, another view was that this complex question was best regulated by national law. Concepts such as gross negligence were susceptible of varying definitions with the result that the provision would lead to uncertainty in application. It was also pointed out that the International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels Convention of 1924) provided exemption from liability in some cases of intentional damage, e.g. when done in furtherance of saving life at sea.¹⁰ These problems could lessen the chances of widespread ratification of the draft Convention if it included a provision based on paragraph II.

¹⁰ Paragraph (4) of article 4 of the Brussels Convention of 1924 is as follows: "Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss on damage resulting therefrom". The Brussels Convention of 1924 appears in the *Register of Texts of Convention and other Instruments Concerning International Trade Law*, vol. 11 (United Nations publication, Sales No. E.73.V.3), chap. II, sect. I.

81. It was also pointed out that while paragraph II might be appropriate for consumer transactions it was less appropriate for transactions between merchants where exclusions of liability for the seller were frequently compensated by a lower price for the buyer.

82. There was considerable support for an amended provision which would permit total exemption clauses when the complete exemption from liability was reflected in a lower price. However, another view was that this proposal still ran counter to the principle of autonomy of the will of the parties contained in article 4 of CISG. Some representatives did not consider that article 4 caused difficulty since CISG specifically excluded itself from questions of formation.¹¹

83. After considerable discussion no consensus could be reached on the desirability of including in the draft Convention a provision based on paragraph II. Accordingly, the paragraph was not retained.

Paragraph III

84. In support of paragraph III it was stated that prior to the formation of the contract the parties had duties and responsibilities toward each other. The proposal recognized these duties and provided compensation for costs in the event of their violation. The fact that a contract had not yet come into existence was recognized by the fact that the sanction provided by the provision was limited to the recovery of costs and did not include other items of damages such as recovery for loss of profit. It was also suggested, however, that the paragraph should provide for recovery of all damages.

85. However, the generally prevailing view was that the paragraph was too vague and uncertain to be usefully included in the draft Convention. Furthermore, the inclusion might lessen the chances of widespread ratification of the Convention.

86. After deliberation, the Working Group decided not to retain paragraph III.

Decision

87. The Working Group adopted the following text (which was later numbered as article 5):

"In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith."

C. Formation of contracts for the international sale of goods

Article 1

88. The text of article 1 as adopted by the Working Group at its eighth session was as follows:¹²

"[Article 1 (alternative 1)]

"This Convention applies to the formation of contracts of sale of goods which, if they were concluded, would be governed by the Convention on the International Sale of Goods."

"[Article 1 (alternative 2)]

"(1) This Convention applies to the formation of

¹¹ Article 6.

¹² Those matters which were not resolved by the Working Group at its eighth session were placed in square brackets.

contracts of sale of goods entered into by parties whose places of business are in different States:

“(a) When the States are Contracting States; or

“(b) When the rules of private international law lead to the application of the law of a Contracting State.

“(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the offer, any reply to the offer, or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

“(3) This Convention does not apply to the formation of contracts of sale:

“(a) Of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, did not know and had no reason to know that the goods were bought for any such use;

“(b) By auction;

“(c) On execution or otherwise by authority of law;

“(d) Of stocks, shares, investment securities, negotiable instruments or money;

“(e) Of ships, vessels or aircraft;

“(f) Of electricity.

“(4) This Convention does not apply to the formation of contracts in which the predominant part of the obligations of the seller consists in the supply of labour or other services.

“(5) The formation of contracts for the supply of goods to be manufactured or produced is to be considered as the formation of contracts of sale of goods unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

“(6) For the purposes of this Convention:

“(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the proposed contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

“(b) If a party does not have a place of business, reference is to be made to his habitual residence;

“(c) Neither the nationality of the parties nor the civil or commercial character of the parties or of the proposed contract is to be taken into consideration.]”

Scope of application of the draft Convention

89. The Working Group considered the scope of application provisions in article 1 in the light of its decisions to include in the draft Convention rules on the interpretation of communications, statements and declarations by and acts of the parties and to include a provision on fair dealing and good faith in the formation of a contract.

Alternative 1

90. This alternative was discussed in the light of the following example. The buyer has his place of business in State A which has ratified both CISG and the Forma-

tion Convention and which has therefore chosen alternative 1 of article 1. The seller has his place of business in State B which is not party to CISG but which is party to the Formation Convention and has accordingly chosen alternative 2 of article 1. For the courts of State A it would appear that the Formation Convention does not apply since article 1 of CISG would exclude the transaction from the ambit of CISG because both States were not Contracting States¹³ and the rules of private international law¹⁴ would normally lead to the application of the law of the place of business of the seller, which State was not party to CISG. However, if the question arose before the courts of State B the transaction would be governed by the Formation Convention since article 1 (1) (a) of alternative 2 would be satisfied.

91. There was considerable support for the view that this result was inappropriate and that the Formation Convention should apply if the parties had their places of business in different Contracting States. This result could be achieved by deleting alternative 1 and relying solely upon alternative 2.

92. The deletion of alternative 1 was also supported by representatives who considered that a State which adhered only to the Formation Convention should be able to do so on the same basis as a State which adhered to both the Formation Convention and the Sales Convention.

93. Under another view, alternative 1 was merely a shorthand expression of alternative 2, which was identical in material respects to article 1 of CISG. Therefore, it was unlikely that a court would reach the conclusion suggested in the example. One representative favoured the retention of alternative 1 as it would make the Formation text inapplicable where a party had his place of business in a State which had declared that the application of CISG depends upon its express adoption by the parties and those parties had not decided to adopt it.¹⁵

94. After deliberation, the Working Group deleted alternative 1 of article 1.

Alternative 2

Article 1 (1) (b)

95. The Working Group considered a proposal for the deletion of article 1 (1) (b).

96. Under one view this provision, although appropriate in CISG, was not appropriate in a Convention on Formation of Contracts because the rules of private international law do not necessarily select one law to govern all elements in the formation process. However, another view was that, since article 1 (1) (b) was identical to article 1 (1) (b) of CISG which had been formulated after long and exhaustive discussion by the Working Group and which had been adopted by the Commission, it would be inappropriate for the Working Group to alter the provision at this stage. Any changes should be proposed during the diplomatic conference which would be convened to consider the draft Conventions.

¹³ Article 1 (1) (a) of CISG is in the same terms as article 1 (1) (a) of alternative 2 of article 1 of this draft.

¹⁴ Article 1 (1) (b) of CISG is in the same terms as article 1 (1) (b) of alternative 2 of article 1 of this draft.

¹⁵ Cf. Convention relating to a Uniform Law on the International Sale of Goods, The Hague, 1 July 1964, article V.

97. The deletion of article 1 (1) (b) was also supported on the basis that its effect in a non-Contracting State was uncertain. It was not clear whether the courts of non-Contracting States would, if their rules of private international law lead to the application of the law of a Contracting State, apply only the domestic law of that State or apply the rules contained in the Convention which had been adhered to by that State. It was suggested that the result may depend upon the manner in which that Contracting State had incorporated the Convention into its domestic legal system. Accordingly, it was proposed that article 1 (1) (b) should either be deleted or that the report should indicate whether it was intended that the rules contained in the Convention should apply in the courts of a third State not party to the Convention.

98. It was stated that the same type of problem arose in the case of a party having his place of business in a Contracting State and a party having his place of business in a non-Contracting State.

99. On the other hand, it was pointed out that non-Contracting States could not be bound by provisions in a Convention to which they were not party. Accordingly, the fact that a provision in a Convention might lead to conflicting interpretations in non-Contracting States was no argument for deletion of that provision.

100. After deliberation, the Working Group decided to retain article 1 (1) (b).

Drafting changes

101. The Working Group also requested the Drafting Group to effect a number of drafting changes, in particular the replacement of the phrase "entered into by" in article 1 (1) by "between". The Drafting Group was also requested to ensure that any changes in the drafting of the scope of application provisions of CISG by the Commission at its tenth session would be reflected in the drafting of article 1.

Decision

102. The text of article 1 as adopted by the Working Group is as follows:

"(1) This Convention applies to the formation of contracts of sale of goods between parties whose places of business are in different States:

"(a) When the States are Contracting States; or

"(b) When the rules of private international law lead to the application of the law of a Contracting State.

"(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the offer, any reply to the offer, or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

"(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the proposed contract is to be taken into consideration.

"(4) This Convention does not apply to the formation of contracts of sale:

"(a) Of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor

ought to have known that the goods were bought for any such use;

"(b) By auction;

"(c) On execution or otherwise by authority of law;

"(d) Of stocks, shares, investment securities, negotiable instruments or money;

"(e) Of ships, vessels or aircraft;

"(f) Of electricity.

"(5) This Convention does not apply to the formation of contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

"(6) The formation of contracts for the supply of goods to be manufactured or produced is to be considered as the formation of contracts of sale of goods unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

"(7) For the purposes of this Convention:

"(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the proposed contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

"(b) If a party does not have a place of business, reference is to be made to his habitual residence."

Article 2

103. The text of article 2 as adopted by the Working Group at its eighth session is as follows:

"(1) The parties may [agree to] exclude the application of this Convention.

"(2) Unless the Convention provides otherwise, the parties may [agree to] derogate from or vary the effect of any of its provisions as may appear from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usages.

"(3) However, a term of the offer stipulating that silence shall amount to acceptance is invalid."

Paragraphs (1) and (2)

Necessity for agreement to exclude or vary Convention

104. The Working Group considered a proposal to retain the expression "agree to" which appeared in articles 2 (1) and 2 (2) and which had been placed in square brackets at the eighth session of the Working Group.

105. Under one view the will of one party should be sufficient to exclude the application of the Convention or to derogate from or vary the effect of any of its provisions. In support of this view it was stated that it was unlikely that the parties would reach agreement on the question of the applicability of the Convention prior to the conclusion of their contract since the usual way in which the Convention would be excluded would be by general conditions attached to an offer which specified, *inter alia*, the manner in which any future contract between the parties was to be concluded. The Conven-

tion should permit this practice which recognized the principle that the offeror can specify the manner in which the offeree must accept the offer.

106. However, there was strong support for the view that exclusion or variation of the provisions of this Convention should be permitted only by express or implied agreement between the parties. It was stated that it was difficult to understand how one party could unilaterally impose on the other party his decision to exclude the Convention or to derogate from or vary any of its provisions. A party could bind only himself but not the other party by a unilateral declaration. It was noted that it was quite common for parties to reach agreement on numerous points during the formation process and prior to the conclusion of the contract. Accordingly, the question of the exclusion of the Convention was properly left to agreement between the parties. This approach also had the benefit of encouraging the application of the Convention.

107. The Working Group decided to retain the words "agree to" in article 2 (1) and 2 (2), thereby making both provisions subject to agreement between the parties.

Article 2 (2)

108. The Working Group did not adopt a proposal that the words "as may appear from the preliminary negotiations, the offer, the reply, the practices which the parties had established between themselves or usages" be deleted from article 2 (2). The Working Group also did not adopt a proposal that article 2 (2) should not apply to contracts which were intended to be concluded in written form.

109. A representative requested that the report reflect the view of her delegation that article 2 (2) should not apply to contracts concluded in written form.

110. The Working Group deleted the word "preliminary" to make the provision conform to article 14 (4).

111. The Working Group recalled that at its eighth session it had decided that the parties were not to be permitted to derogate from or vary the provisions of article 4, but noted that the text that it had adopted at its eighth session did not reflect this decision.

Article 2 (3)

112. There was general agreement with the rule in article 2 (3) that the offeror could not unilaterally impose on the offeree a term of the offer that his silence would constitute acceptance of the offer. However, there was a difference of views as to whether silence on the part of the offeree could ever constitute acceptance of the offer.

113. Under one view the parties should have the possibility to agree that silence on the part of the offeree would constitute acceptance. It was stated that such situations might often arise where a buyer and a seller had continuing commercial relations.

114. Under another view an acceptance should always be made by declaration. Therefore, there would be no occasion in which silence could amount to acceptance. Yet another view was that silence which was not accompanied by some objective act should not constitute acceptance.

115. Another question raised was whether the offeror should be bound if he had said in his offer that the silence of the offeree would constitute acceptance and the offeree relied upon this statement by intending to accept but remaining silent.

116. The Working Group decided to adopt the principle in article 2 (3) that the offeror could not impose a term of the offer that silence would constitute acceptance but to make it clear in article 2 (3) and in article 8 (1) that the parties could agree that silence would constitute acceptance.

117. One representative objected to enabling the parties to create a contract by means of silent acceptance.

Decision

118. The text of article 2 as adopted by the Working Group is as follows:

"(1) The parties may agree to exclude the application of this Convention.

"(2) Unless the Convention provides otherwise, the parties may agree to derogate from or vary the effect of any of its provisions as may appear from the negotiations, the offer or the reply, the practices which the parties have established between themselves or from usages.

"(3) Unless the parties have previously agreed otherwise, a term of the offer stipulating that silence shall amount to acceptance is not effective."

Article 3

119. The text of article 3 as adopted by the Working Group at its eighth session is as follows:

"[Article 3 (alternative 1)]

"An offer or an acceptance need not be evidenced by writing and shall not be subject to any other requirement as to form. In particular, they may be proved by means of witnesses."

"[Article 3 (alternative 2)]

"Neither the formation or validity of a contract nor the right of a party to prove its formation or any of its provisions depends upon the existence of a writing or any other requirement as to form. The formation of the contract, or any of its provisions, may be proved by means of witnesses or other appropriate means."

120. The Commission at its tenth session adopted the following text of article 11 of CISG:

"Article 11

"(1) A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

"(2) Paragraph (1) of this article does not apply to a contract of sale where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention."

121. Article (X), to which article 11 of CISG refers, is as follows:

"Article (X)"

"A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing, may at the time of signature, ratification or accession, make a declaration to the effect that article 11, paragraph (1) shall not apply to any sale involving a party having his place of business in a State which has made such a declaration."

Article 3 in general

122. The Working Group decided to proceed on the basis of article 11 and article (X) of CISG which had been adopted by the Commission at its tenth session.

Paragraph (1)

123. The Working Group considered a proposal that the opening words of the first sentence of article 11 (1) be amended to conform to alternative 1 of article 3 so that the provision would begin "[a]n offer or an acceptance need not be evidenced by writing. . .". The Working Group also considered an allied proposal that the words "or any other act" be added after the word "acceptance".

124. In support of the first proposal it was stated that this formulation was more precise than the general formulation contained in article 11 (1) of CISG in that it emphasized that neither the offer nor the acceptance need be in writing. In support of the second proposal it was stated that the use of this wording would ensure that article 3 would cover all matters relating to the formation of the contract.

125. However, another view was that it was more appropriate to retain the formulation used in article 11 (1) of CISG because both that article and article 3 of this Convention dealt with matters of formation. It would thus be confusing to be faced by two versions of essentially the same provision.

126. The Working Group decided to adopt article (11) 1 of CISG as article 3 (1) of this draft Convention.

127. A representative reserved his position with respect to the adoption of the second sentence of article 11 (1) of CISG in this Convention because he considered that contracts should not be able to be proved by means of witnesses.

Proposed additional sentence to paragraph (1)

128. The Working Group considered a proposal that article 3 (1) should contain an additional sentence providing an exception to article 2 (2) to the effect that a party could unilaterally exclude article 3 and provide that his contract with the offeree must be in writing to be binding on him.

129. This proposal was supported on the basis that a party should be able to require that his contract be in writing.

130. The proposal was opposed on the basis that it ran counter to the principle that the Working Group had adopted in respect of article 2 (2), i.e. that any derogation from or variation of the provisions of the Convention required agreement of the parties. It was also suggested that under article 7 (1) a purported oral acceptance of an offer which required a written acceptance would not constitute an acceptance and that, therefore, no contract would be concluded.

131. The Working Group did not adopt the proposal to enable unilateral derogation from article 3. Two representatives reserved their position with respect to this decision.

Paragraph (2)

132. The Working Group considered a proposal that a sentence be added to paragraph (2) which would provide that the parties could neither refuse to apply this paragraph nor modify it by virtue of article 2, paragraph (2), of this Convention.

133. Under one view this provision was necessary because article 2 (2), which permits variation of or derogation from the provisions of the Convention, could give rise to the argument that the parties could render ineffective a declaration of a Contracting State under article (X) by agreeing to exclude or derogate from the effect of paragraph (2) of this article by virtue of article 2 (2).

134. Under another view it was inappropriate to depart from the text of CISG and that, therefore, the proper procedure would be for the Working Group to draw the attention of the Commission to the problem.

135. The Working Group decided to retain the proposal. One representative requested that the report reflect his opinion that in cases where article 3 (2) and article (X) applied, the question of whether the formation of the contract required writing would depend upon the applicable law which was not necessarily that of the State which had made the declaration. Accordingly, it was still possible for the contract to be concluded without a writing.

Decision

136. The text of article 3 as adopted by the Working Group is as follows:

"(1) A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

"(2) Paragraph (1) of this article does not apply to a contract of sale where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

Article (X)

137. The Working Group decided that article (X) of CISG should be adopted as the basis for a similar provision in this Convention. It noted, during its consideration of article (X) in connexion with article 3 (2), that provision for similar declarations might be necessary in respect of other articles of this Convention.¹⁶ The text of article (X) is as follows:

"A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may at the time of signature, ratification or accession make a declaration to the effect that the provisions of this Convention, in so far as they allow the conclusion, modification or rescission of the con-

¹⁶ Provision for similar declarations was also made in respect of other articles in the draft Convention: see paras. 152, 250 and 293 below.

tract, offer, acceptance or any other indication of intention to be made otherwise than in writing shall not apply if one of the parties has his place of business in the declarant State."

Article 3 A

138. The text of article 3 A as adopted by the Working Group at its eighth session is as follows:

"(1) The contract may be modified or rescinded merely by agreement of the parties.

"(2) A written contract which contains a provision requiring any modification or rescission to be in writing may not be otherwise modified or rescinded. [However, a party may be precluded by his action from asserting such a provision to the extent that the other party has relied to his detriment on that action.]"

Article 3 A (1)

139. The Working Group noted that the use of the word "merely" was intended to indicate that the common law doctrine of consideration was inapplicable to the modification or rescission of a contract.

140. The Working Group did not adopt a proposal that article 3 A (1) specifically include reference to the substitution of a new contract for the original contract because this addition was generally considered to be unnecessary. The paragraph was adopted without change.

Article 3 A (2)

Modification or rescission of written contracts

141. The Working Group considered a proposal that article 3 A (2) read as follows:

"(2) A written contract may not be otherwise modified or rescinded."

142. This proposal was supported on the basis that it would minimize disputes and help create certainty of contract. It was also stated that such a provision was necessary for large organizations which needed to be able to insist on written modifications or rescissions to written contracts for purposes of control.

143. However, under another view this restriction could cause serious injustice in cases where the action of one party had led the other party to rely on an expectation either that a subsequent written agreement to modify or rescind the contract would be forthcoming or that the first party would not insist on a writing. Therefore, it was important that the second sentence of article 3 A (2) be retained.

144. After considerable discussion the Working Group rejected the proposal.

Deletion of article 3 A (2)

145. The Working Group considered a proposal that article 3 A (2) be deleted.

146. It was stated by some representatives that the rule in the first sentence of article 3 A (2) was wrong in that if the parties had in fact agreed to modify or rescind the contract, that agreement should be effective even if it was not in writing. This result would be reached under

article 3 A (1) if article 3 A (2) was deleted. The deletion of article 3 A (2) was also favoured by some representatives as an alternative to the proposal discussed in paragraphs 141 to 144 above.

147. On the other hand it was stated that article 3 A (2) represented a balance between the needs of some parties to ensure that modifications and rescissions of their contracts were in writing so as to preserve an adequate paper record of their transactions and the needs of fairness to the other party.

148. The Working Group decided not to adopt the proposal to delete article 3 A (2).

Deletion of phrase "to his detriment"

149. The Working Group considered a proposal to delete the expression "to his detriment."

150. The view was expressed that the words "to his detriment" were vague, and unnecessary. However, the expression was supported on the basis that it provided a useful criterion which would assist a court in determining whether the rule stated in the first sentence of article 3 A (2) should be applied.

151. After deliberation, the Working Group deleted the expression "to his detriment."

Proposed article 3 A (3)

152. The Working Group adopted a proposal to add a new paragraph (3) to article 3 A, similar to article 3 (2), which would provide that a Contracting State could make a declaration under article (X) in respect of paragraphs (1) and (2) of article 3 A, in so far as these two paragraphs allow a modification or rescission of a contract otherwise than in writing. The Working Group also decided to make a corresponding amendment to article (X).¹⁷

Decision

153. The Working Group adopted the following text of article 3 A (which was later renumbered as article 18):

"(1) The contract may be modified or rescinded by the mere agreement of the parties.

"(2) A written contract which contains a provision requiring any modification or rescission to be in writing may not be otherwise modified or rescinded. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

"(3) This article does not apply to the modification or rescission of a contract in so far as it is allowed otherwise than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

Article 4

154. The text of article 4 as adopted by the Working Group at its eighth session is as follows:

"(1) A proposal for concluding a contract [addressed to one or more specific persons] constitutes

¹⁷ The text of article (X) is found in para. 137.

an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

"(2) An offer is sufficiently definite if expressly or impliedly it indicates the kind of goods and fixes or makes provision for determining the quantity and the price. [Nevertheless, if the offer indicates the intention to conclude the contract even without making provision for the determination of the price, it is considered as a proposal that the price be that generally charged by the seller at the time of the conclusion of the contract or, if no such price is ascertainable, the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.]"

Article 4 (1)

Public offers

155. The Working Group considered whether the draft Convention should deal with public offers.

156. One view was that the draft Convention should make provision for public offers which were becoming more important in international trade. However, it was also stated that while public offers may be increasing in certain types of international transactions they were still uncommon in the international sale of goods so that their regulation could be left to national law. It was also stated that in view of the limited amount of time available to the Working Group it would be more appropriate to consider the question of public offers in connexion with the Commission's new long-term programme of work. The rules needed to regulate public offers were complex and could perhaps be dealt with in a separate Convention.

157. The Working Group, after considerable discussion which revealed that most representatives favoured the inclusion of rules on public offers, considered a proposal that the phrase in square brackets in article 4 (1) be maintained and that the following paragraph based on article 2 (3) of the draft Uniform Law on the Formation of Contracts in General elaborated by UNIDROIT be added as a new article 4 (2):

"(2) Offers not addressed to one or more specific persons are to be considered, unless the contrary is clearly indicated by the person making the statement, merely as invitations to make offers."

158. This proposal to deal separately with public offers was generally supported. It was noted that setting out the rule on public offers in a separate provision would make it easier, if desired, to modify such other provisions as were thought to be affected by public offers. However, some representatives considered that it would be sufficient to delete the phrase "[addressed to one or more specific persons]" contained in article 4 (1).

159. The Working Group decided to adopt the proposal to retain the expression "addressed to one or more specific persons" in article 4 (1) and to accept in principle the proposed text which was to appear as a new article 4 (2).

160. The Working Group considered a proposal to introduce a rule on acceptance of public offers. This proposal did not gain widespread support. The question

of withdrawal and revocation of public offers is discussed in paragraph 180 below.

Indication of intention to be bound

161. The Working Group considered a suggestion to replace the requirement that the offer must indicate the intention of the offeror to be bound by a provision stating that this intention could be deduced from the circumstances surrounding the transaction. This suggestion was based on recent developments in the use of automatic data processing (ADP) systems where the communications by themselves may not indicate an intention on the part of the offeror to be bound but which would do so if all the circumstances of the transaction were examined.

162. The Working Group did not adopt this proposal since it was considered that the result which it was designed to achieve had already been achieved by the rules on interpretation contained in article 14.

Article 4 (2)

First sentence of article 4 (2)

163. The Working Group considered a proposal for the deletion of the first sentence of article 4 (2) and a proposal that the rule that it expresses be phrased in the negative.

164. Support for the deletion of the first sentence was based on the view that it was very difficult, if not impossible, to gain agreement on a definition of "sufficiently definite" for the purposes of determining whether a proposal for concluding a contract constitutes an offer. Accordingly, it was preferable to leave the matter to national law rather than attempt to reach an unsatisfactory compromise definition in the text. This was stated to have the added advantage of adopting the approach of the 1964 Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) which had already been ratified by a number of States.

165. The proposal to express the rule in the first sentence of article 4 (2) in the negative, i.e., to state that an offer is not sufficiently definite unless expressly or impliedly it indicates the kind of goods and fixes or makes provision for determining the quantity and the price, would make it possible to hold that in a given transaction a contract could not be concluded without agreement on additional elements while at the same time recognizing that no contract of sale could be concluded without agreement on at least these three elements.

166. However, there was considerable support for the view that the first sentence of article 4 (2) provided a useful uniform definition of what was "sufficiently definite" to enable a proposal for concluding a contract to be considered an offer. It was also stated that the advantages of this approach would be destroyed by a negative formulation of the definition. It was added that it was always open to the offeror or the offeree to require agreement on further elements of the transaction before the contract would be concluded.

167. After considerable discussion the Working Group decided to retain the first sentence of Article 4 (2). The Working Group rejected the proposal to ex-

press the first sentence of article 4 (2) in the negative because it was considered that the criteria set out in the sentence should be sufficient in themselves to make a proposal sufficiently definite to constitute an offer. Adoption of the negative formulation would have led to a contrary result. For similar reasons the Working Group rejected a proposal to amend the first sentence so that the proposal would have been sufficiently definite if it "at least" indicates the kind of goods and fixes or makes provision for determining the quantity and the price.

168. A representative and an observer requested that the report reflect their view that article 4 of ULF was preferable to the text adopted by the Working Group and that the requirements set out in article 4 (2) were only minimum requirements.

Deletion of second sentence of article 4 (2)

169. The Working Group considered a proposal to delete the second sentence of article 4 (2).

170. This proposal was supported on the basis that article 37 of CISG upon which the provision was based had been agreed to by the Commission on the assumption that it applied only to contracts which had been validly concluded according to the applicable law. However, the inclusion of the provision in this Convention would make valid the conclusion of contracts which did not state a price or make provision for its determination even though many legal systems refuse to recognize such contracts. The deletion of article 4 (2) was also supported on the basis that it selected the seller's price in cases where the offer did not state a price or make provision for its determination.

171. The retention of the second sentence of article 4 (2) was supported on the basis that it contained a useful rule and that it was essential to keep the provisions in this draft parallel to those contained in CISG.

172. The Working Group, after deliberation, decided to retain the second sentence of article 4 (2).

173. Two representatives expressed reservations to this decision. The Working Group agreed to include these reservations as a foot-note to the text of the article.

Decision

174. The Working Group adopted the following text of article 4 (which was later renumbered as article 8):

"(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

"(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

"(3) A proposal is sufficiently definite if it indicates the kind of goods and fixes or makes provision for determining the quantity and the price. Nevertheless, if a proposal indicates the intention to conclude the contract even without making provision for the determination of the price, it is considered as proposing that the price be that generally charged by the seller at the time of the conclusion of the contract or,

if no such price is ascertainable, the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances."

Article 5

175. The text of article 5 as adopted by the Working Group at its eighth session is as follows:

"(1) The offer becomes effective when it has been communicated to the offeree. It can be withdrawn if the withdrawal is communicated to the offeree before or at the same time as the offer [even if it is irrevocable].

"(2) The offer can be revoked if the revocation is communicated to the offeree before he has dispatched his acceptance [, shipped the goods or paid the price].

"(3) However, an offer cannot be revoked:

"(a) If the offer expressly or impliedly indicates that it is firm or irrevocable; or

"(b) If the offer states a fixed period of time for [acceptance] [irrevocability]; or

"(c) If it was reasonable for the offeree to rely upon the offer being held open and the offeree has altered his position to his detriment in reliance on the offer."

Article 5 (1)

176. The Working Group adopted the phrase "even if it is irrevocable" which it had placed within square brackets at its eighth session. This phrase was considered to contain a practical rule which made it clear that all offers could be withdrawn if the withdrawal was communicated to the offeree before or at the same time as the offer.

177. The Working Group requested the Drafting Group to consider whether article 5 (1) could be reformulated to explain the distinction between withdrawal of an offer and revocation of an offer. There was general agreement that "withdrawal" referred to the period of time before the offer became effective and that "revocation" referred to the period of time after the offer became effective. However, doubts were expressed whether the distinction was clear because the offer could be withdrawn if it had been communicated to the offeree at the same time as the withdrawal, which meant that both communications were effective but that the withdrawal took precedence over the offer and revoked it.

Communication of offers

178. The Working Group noted that by the definition of the word "communicated" in article 12,¹⁸ an offer and the withdrawal of an offer become effective under article 5 (1) and a revocation of an offer becomes effective under article 5 (2) at the moment the offer, withdrawal or revocation is delivered to the addressee whereas article 10 of CISG adopted the general principle that communications were effective on dispatch.

179. One representative and two observers stated that offers and acceptances and their revocation should

¹⁸ The Working Group when considering article 12 replaced the words "communicated to" with "reaches". See para. 292 below.

be effective only when the particular communication comes to the knowledge of the addressee.

*Withdrawal and revocation of public offers*¹⁹

180. The Working Group noted two proposals relating to public offers. The first proposal made the withdrawal and revocation of a public offer effective when the offeror has taken reasonable steps to bring the withdrawal or revocation to the attention of those to whom the offer was addressed. The second proposal provided that a public offer becomes effective when it is notified in a manner by which the public can recognize it and that it may be revoked by a notice made in the same manner as that in which it was made. The Working Group did not have sufficient time to consider these proposals and accordingly requested the Secretariat to bring the matter to the attention of the Commission at its eleventh session in 1978.

Article 5 (2)

181. The Working Group considered a proposal to delete the expression "shipped the goods or paid the price" which had been placed in square brackets at its eighth session.

182. This proposal was supported on the basis that the only form of acceptance which the draft Convention should recognize was an acceptance by declaration. It was added that while shipment of the goods or payment of the price were not acts of acceptance according to article 8 their effect was very similar under article 5 (2) in that the offer could no longer be revoked by the offeror. Furthermore, it was stated, in these cases the offer would frequently be irrevocable by the operation of article 5 (3) (c) since the offeree would have acted in reliance on the offer and it would have been reasonable for him to do so.

183. The rule that the offer cannot be revoked if the offeree has shipped the goods or paid the price was supported on the basis that it was a useful rule which created no more uncertainty than the rule that an offer could not be revoked if the offeree had dispatched his acceptance, which is already found in article 5 (2). It was also pointed out that ULF had the same rule in a different formulation in that the contract would be accepted by shipment of the goods or payment of the price, after which the offer could no longer be revoked.

184. After considerable deliberation the Working Group deleted the phrase "shipped the goods or paid the price" from article 5 (2).

185. A representative expressed a reservation in respect of this decision, stating that to permit revocation of an offer after dispatch of the goods or payment of the price was contrary to the principles of good faith in international trade.

186. The Working Group noted that the deletion of the phrase "shipped the goods or paid the price" would necessitate reconsideration of article 8 (1 *ter*).

187. A representative pointed out that since article 5 (2) uses the term "dispatched his acceptance", it followed that the article was inapplicable to cases when the acceptance is effective upon the doing of an act (see paras. 241 to 250 below).

Article 5 (3)

Subparagraph (a)

188. The Working Group adopted article 5 (3) (a) and requested the Drafting Group to consider whether it was necessary to use the expression "expressly or impliedly" in view of the rules on interpretation contained in the draft Convention.

Subparagraph (b)

189. The Working Group considered three proposals in respect of article 5 (3) (b). The first was to adopt the word "acceptance", the second was to adopt the word "irrevocability" and the third was to delete the provision.

190. The proposal to adopt the word "acceptance" was supported on the basis that it recognized a widely accepted rule in civil law systems and also created a rule that was appropriate for international sales of goods.

191. However, it was pointed out that the rule was unknown in common law countries. In those countries merchants were accustomed to making offers in which they set a maximum period of time for acceptance but did not intend thereby to make their offers irrevocable for that period. The adoption of the word "acceptance" in article 5 (3) (b) would create a trap for merchants from those countries. Therefore, it was suggested that the word "irrevocability" be adopted.

192. In opposition to the adoption of the word "irrevocability" it was pointed out that an offer which "stated a fixed period of time for irrevocability" would already be irrevocable under article 5 (3) (a).

193. The proposal to delete subparagraph (b) was rejected when it became evident that there would be different interpretations in different legal systems as to whether an offer which stated that the offeree had, for example, two weeks in which to accept would be considered to have indicated whether it was firm or irrevocable under article 5 (3) (a).

194. The Working Group decided to adopt the proposal that an offer cannot be revoked "if the offer states a fixed period of time for acceptance".

195. Three representatives requested that, since the rule that an offer cannot be revoked if it states a fixed period of time for "acceptance" would cause considerable difficulties in some legal systems, the word "acceptance" be placed in square brackets. The Working Group declined to place the word "acceptance" in square brackets since reservations had been expressed against other provisions without those provisions being placed in square brackets. Accordingly there was no reason to use square brackets in relation to this provision.

196. Two representatives expressed reservations in respect of article 5 (3) (b).

Subparagraph (c)

197. The Working Group considered a proposal to delete article 5 (3) (c).

198. The deletion of article 5 (3) (c) was supported on the basis that only the offeror should be able to make his offer irrevocable. The deletion of the provision was also supported on the basis that the article contained a

¹⁹ The question of acceptance of public offers is discussed in paras. 155 to 160 above.

vague test which appeared unnecessary since it would not be reasonable for the offeree to alter his position to his detriment on the basis that the offer was still open unless the conditions in article 5 (3) (a) or 5 (3) (b) were satisfied.

199. However, there was considerable support for the retention of article 5 (3) (c) as it protected the offeree when he properly relied upon the offer being held open. The provision was merely a particular application of the rule requiring good faith and fair dealing in the formation process which the Working Group had already included in the draft Convention. In addition, the rule contained in article 5 (3) (c) was considered to have a certain degree of independent operation from articles 5 (3) (a) and 5 (3) (b). It would cover cases where the offer did not state either that it was firm or irrevocable or that there was a fixed time for acceptance but where the offeree had to engage in extensive investigation to determine whether he should accept the offer. In such cases it was proper that the offer be irrevocable for the period of time necessary for the offeree to make his determination.

200. The Working Group decided to retain article 5 (3) (c).

201. The Working Group deleted the expression "to his detriment" because this expression had been deleted from paragraph (2) of article 3 A (which was later renumbered as article 18).

Decision

202. The Working Group adopted the following text of article 5 (article 5 (1) was later renumbered as article 9; articles 5 (2) and 5 (3) were later renumbered as articles 10 (1) and 10 (2) respectively):

"(1) The offer becomes effective when it reaches the offeree. It is withdrawn if the withdrawal reaches the offeree before or at the same time as the offer even if it is irrevocable.

"(2) The offer is revoked if the revocation reaches the offeree before he has dispatched his acceptance.

"(3) However, an offer cannot be revoked:

"(a) If the offer indicates that it is firm or irrevocable; or

"(b) If the offer states a fixed period of time for acceptance; or

"(c) If it was reasonable for the offeree to rely upon the offer being held open and the offeree has acted in reliance on the offer."

Article 6

203. The text of article 6 as adopted by the Working Group at its eighth session is as follows:

"A contract of sale is concluded at the moment that an acceptance of an offer is effective in accordance with the provisions of this Convention."

204. The Working Group adopted the text of article 6.

205. A representative suggested that the future commentary to article 6 should take into account the fact that a rule for determining the time at which a contract was concluded was, in the view of some representatives who had agreed to the provision, also determinative of the place where the contract had been concluded.

Proposed article 6 (2) and 6 (3)

206. The Working Group considered a proposal that the following paragraphs be added to article 6:

"(2) A contract of sale is concluded only at the moment the contracting parties have agreed upon all items upon which agreement was to be achieved according to the will of one party.

"(3) A contract of sale is concluded also in case that various contractual conditions are invalid, if it is to be supposed that the parties would have concluded the contract even without these conditions."

Proposed article 6 (2)

207. This proposal was supported on the ground that the article would make it clear that should a party require agreement on more than the kind, quantity and price of the goods, which article 4 specifies are necessary for a proposal to be "sufficiently definite to constitute an offer", a contract would not be concluded until agreement on all the items which either party has stated were necessary. This rule would also be of assistance in cases where a contract was formed as the result of a negotiating process rather than from a separately identifiable offer and acceptance. Proposed article 6 (2) was also supported on the basis that it would provide a safeguard for offerors if article 7 (2) was retained by the Working Group since that article permitted the conclusion of a contract even though the purported acceptance did not precisely match the offer.

208. Proposed article 6 (2) was opposed as being unnecessary since the offeror was always able to state in his offer those points upon which agreement must be reached. Likewise, the offeree can always require agreement on those points that he considers essential prior to accepting the offer. In addition, it was unrealistic to have a general rule which required agreement on all matters prior to the conclusion of a contract. Minor discrepancies between the offer and the acceptance should be subject to the flexible rules of article 7 (2) rather than preventing the conclusion of the contract.

209. The Working Group decided not to adopt proposed article 6 (2).

Proposed article 6 (3)

210. This proposal was supported on the basis that it provided a useful rule of construction. However, the proposal was generally opposed because it was considered to contain a vague and uncertain test whose application would cause considerable difficulty.

211. The Working Group decided not to adopt proposed article 6 (3).

Decision

212. The Working Group adopted the following text of article 6 (which was later renumbered as article 17):

"A contract of sale is concluded at the moment that an acceptance of an offer is effective in accordance with the provisions of this Convention."

Article 7

213. The text of article 7 as adopted by the Working Group at its eighth session is as follows:

"(1) A reply to an offer containing additions,

limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

"[(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.]

"[(3) If a confirmation of a prior contract of sale is sent within a reasonable time after the conclusion of the contract, any additional or different terms in the confirmation [which are not printed] become part of the contract unless they materially alter it, or notification of objection to them is given without delay after receipt of the confirmation. [Printed terms in the confirmation form become part of the contract if they are expressly or impliedly accepted by the other party.]]"

Article 7 (1)

214. Under one view article 7 (1) was inadequate in that it did not explicitly distinguish between a communication which rejected the original offer and substituted itself as a counter-offer and a communication which treated the offer as open but sought further information or inquired whether some terms could be changed. It was considered that such a general inquiry did not of itself terminate the offer and that the draft Convention should expressly recognize this result. It was also suggested that this result might be achieved by framing article 7 (1) in terms of a purported acceptance so that a general inquiry would be excluded and would thus not constitute a counter-offer.

215. However, there was stronger support for the retention of the present text of article 7 (1). There was general agreement that a mere request for further information, or for clarification of the offer, would not constitute a counter-offer. However, it was thought that this result would be achieved as easily by application of the present text as by any new text which might be adopted in its place.

216. The Working Group accordingly decided to retain the present text of article 7 (1).

Termination of an offer by rejection

217. During the eighth session of the Working Group it was suggested that the Secretariat consider whether any additional subjects within the general scope of the draft Convention might profitably be added to the current text. The Secretariat suggested that termination of an offer by rejection was one such subject (A/CN.9/WG.2/WP.28, paras. 62-71).

218. The Working Group was of the opinion that the draft Convention should contain a provision dealing with the termination of offers by rejection.

219. There was strong support for inclusion in the draft Convention of a rule which would provide that a rejection of an offer would in all cases terminate the offeree's power to accept the offer. It was stated that any time limits for acceptance fixed by an offeror meant that the offeree had that particular time period in which to decide whether to accept or reject the offer. Once a

choice to reject the offer had been made, the offeree's power to accept the offer was at an end.

220. There was some support for the view that irrevocable offers should be treated differently and that an offeree should be able to make a counter-proposal without destroying his power to accept the original offer provided that the terms of his counter-proposal indicated that the original offer had not been rejected and was still being considered.

221. The Working Group also considered a proposal which sought to distinguish between a rejection which would always terminate an offer and a request for changes in the terms of an offer which would terminate a revocable offer but would not terminate an irrevocable offer if the offeree had reserved his right to accept the original offer. This proposition obtained little support because it was considered too complex to be readily understandable by merchants and because it seemed preferable to have a clear rule that rejection of an offer always terminated the offer.

222. Several representatives considered that the draft Convention should not contain any rules on termination of an offer by rejection and that this question be left to the interpretation of the courts in the light of practices established between the parties and usages.

223. The Working Group decided to adopt a new provision to the effect that rejection of an offer, whether revocable or irrevocable, will terminate the offeree's power to accept the offer. The text of the new article is set out in paragraph 230 below.

Article 7 (2)

224. The Working Group considered a proposal that article 7 (2) be deleted.

225. This proposal was supported on the basis that it would be very difficult to arrive at a uniform interpretation of what constituted a non-material alteration to an offer. It was also stated that the principle that the parties have to agree on every point in order to conclude a contract must prevail. Furthermore, a provision which may be considered minor to one party may be extremely important to the other party. The proposal to delete article 7 (2) was also supported on the basis that it impliedly recognized acceptance by silence. It was also noted that the offeror was compelled to object to the new terms "without delay" if he was not to be bound by them. However, this period of time would appear to be measured from the time when the purported acceptance reaches the offeror which, according to the definition of "reaches" in article 12, included delivery to the place of business of the offeror, therefore, the failure to object without delay might simply have been due to a lack of knowledge.

226. The retention of article 7 (2) was supported on the basis that it provided a useful practical rule for a practical problem and that it was favoured by business circles. In most cases in which a reply purports to be an acceptance but it contains additional or different terms which do not materially alter the terms of the offer, both parties believe and act as though a contract had been concluded. If the offeror does not object without delay to those new terms, he should not later be able to avoid his contractual obligations by claiming that there was a minor discrepancy between his offer and the reply.

227. The Working Group decided to retain the existing text of article 7 (2).

Article 7 (3)

228. The Working Group decided to delete this paragraph as it was generally considered that any modifications to the contract after its conclusion should require agreement of the parties in accordance with the provisions of article 3 A (which was later renumbered as article 18).

Decision

229. The Working Group adopted the following text of article 7 (which was later renumbered as article 13):

“(1) A reply to an offer containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

“(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.”

230. Following its decision in paragraph 223 above, the Working Group adopted the following text (article 7 A) dealing with termination of an offer by rejection (this provision was later renumbered as article 11):

“An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.”

Article 8

231. The text of article 8 as adopted by the Working Group at its eighth session is as follows:

“(1) A declaration [or other conduct] by the offeree indicating assent to an offer is an acceptance.

“(1 bis) Acceptance of an offer becomes effective at the moment the indication of assent is communicated to the offeror. It is not effective if the indication of assent is not communicated within the time the offeror has fixed or if no time is fixed, within a reasonable time [, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror]. In the case of an oral offer, the acceptance must be immediate unless the circumstances show that the offeree is to have time for reflection.

“[(1 ter) If an offer is irrevocable because of shipment of the goods or payment of the price as referred to in paragraph (2) of article 5, the acceptance is effective at the moment notice of that acceptance is communicated to the offeror. It is not effective unless the notice is given promptly after that act and within the period laid down in paragraph (1 bis) of the present article.]

“(2) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the hour of the day the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror in a telephone conversation, telex communication or other means of instantaneous communication, begins to run from the hour of the day that the offer is communicated to the offeree.

“(3) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of such period at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.”

Article 8 (1)

232. The Working Group decided to retain the words “or other conduct”, which were in square brackets, so that not only a declaration but also other conduct by the offeree indicating assent to the offer would be an acceptance. It was agreed that article 8 (1) was subject to the rules in article 8 (1 bis).

233. A representative expressed a reservation in respect of this decision on the basis that all acceptances should be in written form.

234. During the discussion in respect of article 2 (3) on acceptance by silence (paras. 112 to 117 above), the Working Group agreed that there were some situations in which silence should not amount to acceptance. Therefore, the Working Group decided to add a new sentence to article 8 (1) providing that silence in itself does not amount to acceptance.

235. An observer expressed a reservation in respect of the inclusion in article 8 (1) of a sentence providing that silence in itself does not amount to acceptance because in some cases the fact of remaining silent may be a clear indication of acceptance.

Article 8 (1 bis)

Expression in square brackets

236. The Working Group considered a proposal to delete the expression within square brackets.

237. This proposal was supported on the basis that the notion of “a reasonable time” did not require further amplification in the text. This was said to be particularly true when part of this amplification was in terms of the “circumstances of the transaction”, which was said to be a very vague and unsatisfactory test.

238. There was also opposition to the words “including the rapidity of the means of communication employed by the offeror” because this standard was considered difficult to apply.

239. Under another view the expression in square brackets was a useful illustration of the type of factors to be taken into account in determining whether the indication of assent had been communicated within a reasonable time.

240. The Working Group decided to retain the expression “due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror”.

Article 8 (1 ter)

241. The Working Group was generally agreed that the deletion of the phrase “shipped the goods or paid the price” from article 5 (2) required at least some modifications to article 8 (1 ter). However there was difference of opinion on whether the provision should be modified or deleted.

242. The Working Group considered a proposal that article 8 (1 *ter*) be based on article 6 (2) of ULF, which provides that acceptance may consist of the dispatch of the goods or of the price or any other act which may be considered equivalent to an acceptance by declaration either by virtue of the offer or as a result of the practices which the parties have established between themselves or of usage.

243. This proposal was supported on the basis that it would introduce a limited but practical exception to the main rule that an acceptance is a declaration or other conduct by the offeree which indicates assent to the offer and that this assent becomes effective at the moment that the indication of assent reaches the offeror. It was considered that, if, by virtue of the offer, the practices which the parties have established between themselves or of usage, the parties had agreed to waive the requirement that the acceptance reach the offeror, the draft Convention should not reimpose such a requirement.

244. It was suggested that this proposal was too narrow in that it required dispatch of the price, whereas other acts such as the opening of a letter of credit should be sufficient.

245. Under another view, shipment of the goods or payment of the price or other acts which indicated assent to the offer should constitute acceptance only if the offeror had knowledge of those acts. It was noted that in a number of legal systems it was against the basic principles of the law of contract for a party to be bound without his knowledge. It was stated that this proposal would have particularly undesirable results in international trade where an offeror could be bound to a contract without his knowledge for a considerable period of time.

246. The proposal was also opposed on the basis that all acceptances should be in written form communicated to the offeror and that if an exception to written form was made there still must be notice to the offeror before the contract could be concluded. It was also suggested that the proposal was superfluous since the parties could always derogate from or vary the effect of the provisions of the Convention by virtue of article 2 (2).

247. After considerable discussion the Working Group adopted the principle that article 8 contain a provision based on article 6 (2) of ULF. The Working Group was agreed that this provision should clearly state that the exception operated only where, by virtue of the offer or the practices established between the parties or of usage, the dispatch of the goods or of the price or the performance of any other act would indicate assent to the offer even though no notice had been given to the offeror. Furthermore, it was agreed, that the act constituting acceptance subject to this paragraph should in conformity with article 8 (3) of ULF be effective only if it was performed within the time-limits set out in paragraphs 2 and 3 of article 8 (1 *bis*).

248. The Working Group established a Special Working Party composed of the representatives of France, Hungary and the United Kingdom to prepare a draft text which implemented these decisions.

249. A representative indicated his opposition to the decision of the Group in respect of article 8 (1 *ter*) on

the basis that no acceptance could become effective without notice being communicated to the offeror.

250. The Working Group adopted a proposal to add a new paragraph to article 8, similar to article 3 (2), which would provide that a Contracting State could make a declaration under article (X) in respect of article 8 in so far as the acceptance is allowed otherwise than in writing. The Working Group also decided to make a corresponding amendment to article (X).²⁰

Article 8 (2)

251. The Working Group approved article 8 (2).

Article 8 (3)

252. The Working Group approved article 8 (3).

Decision

253. The Working Group adopted the following text of article 8 (articles 8 (1), 8 (2), 8 (3) and 8 (6) were later renumbered as articles 12 (1), 12 (2), 12 (3) and 12 (4) respectively; articles 8 (4) and 8 (5) were later renumbered as articles 14 (1) and 14 (2) respectively):

“(1) A declaration or other conduct by the offeree indicating assent to an offer is an acceptance. Silence shall not in itself amount to acceptance.

“(2) Subject to paragraph 3 of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. It is not effective if the indication of assent does not reach the offeror within the time he has fixed or if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

“(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed provided that the act is performed within the period of time laid down by the second and third sentences of paragraph 2 of this article.

“(4) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

“(5) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of the period for acceptance at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-

²⁰ The text of article (X) is found in para. 137.

business days occurring during the running of the period of time are included in calculating the period.

"(6) This article does not apply to the acceptance of an offer in so far as the acceptance is allowed otherwise than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

Article 9

254. The text of article 9 as adopted by the Working Group at its eighth session is as follows:

"(1) If the acceptance is late, the offeror may nevertheless consider it to have arrived in due time on condition that he promptly so informs the acceptor orally or by dispatch of a notice.

"(2) If however the acceptance is communicated late, it shall be considered to have been communicated in due time, if the letter or document which contains the acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have been communicated in due time; this provision shall not however apply if the offeror has promptly informed the acceptor orally or by dispatch of a notice that he considers his offer as having lapsed."

Article 9 (1)

255. The Working Group rejected a proposal to delete the words "orally or" which would have confined the operation of paragraph (1) to written communications.

256. The Working Group adopted the text of article 9 (1).

257. One observer was of the opinion that the requirement of giving information to the offeree-acceptor should apply only where a fixed time limit had been set for the acceptance of the offer or it otherwise was clear to the offeror that the acceptance did not arrive in time. Another observer stated that in his view it would be preferable to have a rule that, where an acceptance was dispatched within time but reached the offeror late, it should be effective unless the offeror promptly informed the offeree that his offer had lapsed prior to the time that the acceptance had reached him.

Article 9 (2)

258. The Working Group considered a proposal for the deletion of article 9 (2).

259. This proposal was supported on the basis that the rule contained in article 9 (2) was very complex and could lead to difficulties in application because its operation depended on the offeror being able to assess what period of time constituted a normal period for the transmission of the acceptance.

260. However, the prevailing view was that article 9 (2) contained a useful rule, particularly for those legal systems which operated under the theory that an acceptance was effective on dispatch. This provision would help compensate for the fact that the draft Convention generally made acceptance effective when it reached the offeror.

261. It was agreed by the Working Group that if the offeror wished to inform the offeree that he considered his offer as having lapsed prior to the receipt of the late acceptance, he must do so without delay after the acceptance reached him.

262. The Working Group rejected a proposal to delete the words "orally or" which would have confined the operation of paragraph (2) to written communications.

263. The Working Group adopted the text of article 9 (2).

Decision

264. The Working Group adopted the following text of article 9 (which was later renumbered as article 15):

"(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or dispatches a notice to that effect.

"(2) If the letter or document containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree orally that he considers his offer as having lapsed or dispatches a notice to that effect."

Article 10

265. The text of article 10 as adopted by the Working Group at its eighth session is as follows:

"An acceptance cannot be revoked except by a revocation which is communicated to the offeror before or at the same time as the acceptance becomes effective."

266. The Working Group adopted article 10. The Drafting Group was requested to ascertain whether the article could be reformulated so that it would be clear that an acceptance would not become effective if the revocation reached the offeror before or at the same time as the acceptance.

Decision

267. The Working Group adopted the following text of article 10 (which was later renumbered as article 16):

"An acceptance is withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective."

Proposed articles 10 bis to 10 quinquies

268. The Working Group considered a proposal that four new articles based on the following provisions be inserted between articles 10 and 11 of the draft Convention:

"Article 10 bis

"(1) If a contract of sale has been concluded under a suspensive condition, it will become effective at the moment the condition occurs.

"(2) If a contract has been concluded under a resolutive condition, it will become ineffective at the moment the condition occurs.

"Article 10 ter"

"(1) If a contract has been concluded subject to the approval of a third party, it will become effective at the moment this approval is given.

"(2) This will apply also in case the contract was concluded by a representative with reservation as to be approved by the person represented.

"Article 10 quater"

"(1) In case a contract of sale is subject to authorization by a State organ, it will become effective only at the moment this authorization has been given.

"(2) In case a contract of sale contravenes a legal prohibition or is aimed at an impossible service, it will be void.

"Article 10 quinquies"

"(1) In the cases referred to under article 10 *ter* and article 10 *quater* the other party shall be immediately informed of the granting of the approval or authorization.

"(2) If the information is not given within two months after conclusion of the contract the contract shall be regarded as not concluded."

Article 10 bis

269. In support of this provision it was stated that rules relating to conditions precedent and to conditions subsequent would complete the rules on formation of contracts and would deal with two very common situations in international trade and would also cover contingent sales.

270. However, under another view these rules opened up very complex questions of legal theory which could not be adequately dealt with in a few simple provisions. In addition the text did not regulate the consequences of the rule contained in article 10 *bis* (2) and that it would be very difficult to reach consensus on what those consequences should be.

271. The Working Group decided not to adopt proposed article 10 *bis*.

Article 10 ter

272. The Working Group decided not to adopt paragraph (1) of article 10 *ter* for the same reasons which led it to reject article 10 *bis* since the provision appeared to be only a particular example of the principle contained in paragraph (1) of article 10 *bis*.

273. The Working Group decided not to adopt paragraph (2) of article 10 *ter* because it was considered that the question of agency could not be considered in one short article.

Article 10 quater

274. There was no support for article 10 *quater*.

Article 10 quinquies

275. The rejection of proposed article 10 *ter* and 10 *quater* also necessitated the deletion of article 10 *quinquies*.

Proposed articles 10 A and 10 B

276. The Working Group considered a proposal to

insert the following articles after article 10 of the draft Convention:

"Article 10 A"

"General conditions of sale referred to in the offer which are attached to it or known to the offeree or widely known in the international trade are considered to be a part of the contract if the offeree agrees they are to be applied. The terms of the contract prevail if they differ from the general conditions of sale.

"Article 10 B"

"If the parties agree to complete specific terms of the contract later, the contract is considered to be concluded after the parties have achieved a subsequent agreement on the remaining part of the contract unless they indicate to be bound by the agreed terms even if no subsequent agreement is reached."

277. These provisions were supported on the basis that they dealt with matters of major practical importance in international trade which ought to be regulated in this draft Convention.

278. The Working Group decided not to adopt article 10 A because the draft Convention already contained rules for determining the contents of a contract. The Working Group decided not to adopt article 10 B because there was difference of opinion as to whether the rule contained in the provision was appropriate. In addition, it was stated in respect of both articles that the problems raised were too complex to be satisfactorily dealt with in the context of this draft Convention.

Article 11

279. The text of article 11 as adopted by the Working Group at its eighth session is as follows:

"The formation of the contract is not affected by the death of one of the parties or by his becoming physically or mentally incapable of contracting before the acceptance becomes effective unless the contrary results from the intention of the parties, usage or the nature of the transaction."

280. The Working Group considered a proposal to delete this article.

281. This proposal gained widespread support. Yet it was noted that article 11 did not relate to all events which might occur between the making of an offer and its acceptance which would prevent the acceptance from being effective. In particular, it was noted that the provision gave no rule for the eventuality that one or other of the parties would become bankrupt or that, if it was a legal person, it would cease to exist. It was stated that questions of death or physical incapacity of the parties were of minor importance in comparison with problems of bankruptcy and corporate personality and that as the draft Convention did not regulate these major matters relating to contractual capacity it should consequently delete article 11 which dealt only with aspects of contractual capacity of secondary importance in international trade.

282. A representative indicated that he favoured the retention of article 11 as it provided a useful uniform solution for the limited circumstances to which it applied.

Decision

283. The Working Group deleted article 11.

Article 12

284. The text of article 12 as adopted by the Working Group at its eighth session is as follows:

"For the purposes of this Convention an offer, declaration of acceptance or any other indication of intention is 'communicated' to the addressee when it is made orally or delivered by any other means to him, his place of business, mailing address or habitual residence."

Habitual residence

285. The Working Group considered a proposal that reference to "habitual residence" be deleted from article 12.

286. The deletion of express reference to "habitual residence" was supported on the basis that article 1 (6) (b) already provides that if a party does not have a place of business reference is to be made to his habitual residence.

287. Under another view it was useful to retain the reference to "habitual residence" in article 12 since if it was deleted it would not be immediately obvious upon reading article 12 that article 1 (6) (b) permitted delivery to the habitual residence of the addressee if he did not have a place of business.

288. The Working Group decided to maintain the expression "habitual residence" in article 12.

Places to which communications may be sent

289. The decision to retain the term "habitual residence" raised the question whether article 12 enabled the sender of a communication to choose whether the communication is to be sent to the place of business of the addressee or to his mailing address or habitual residence. The Working Group was generally agreed that the sender must, subject to contrary agreement between the parties according to article 2 (2), send the communication to the place of business or mailing address of the addressee and that only if there was no place of business or mailing address could the communication be sent to the habitual residence of the addressee.

Oral communications

290. It was understood that oral communications could be made to the addressee at any place and only to him or to his authorized agents.

291. The Working Group noted that in the case of parties which were corporations or organizations the question of which individuals were authorized to receive oral communications for the purposes of this Convention would be determined by the applicable law.

292. The Working Group accepted a proposal of the Drafting Group to replace the words "communicated to" with "reaches" throughout the Convention.

Declaration of non-application of article 12

293. A representative expressed a reservation in respect of the inclusion of oral communications within

article 12. On the proposal of this representative, the Working Group agreed to include a paragraph in article 12 based on article 11 (2) of CISG to enable States to declare that article 12 does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X).²¹

Decision

294. The Working Group adopted the following text of article 12 (which was later renumbered as article 7):

"(1) For the purposes of this Convention an offer, declaration of acceptance or any other indication of intention 'reaches' the addressee when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

"(2) Paragraph (1) of this article does not apply to an offer, declaration of acceptance or any other indication of intention if any of them is made in any other form than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

Article 13

295. The text of article 13 as adopted by the Working Group at its eighth session is as follows:

"Usage means any practice or method of dealing of which the parties knew or had reason to know and which in international trade is widely known to and regularly observed by parties to contracts of the type involved in the particular trade concerned."

296. Article 7 of CISG is as follows:

"(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

"(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

297. The Working Group considered a proposal to shorten article 13 by deleting reference to the knowledge of the parties since these matters were already dealt with in the article on interpretation. This proposal was withdrawn for lack of support because the notion of usages contained in CISG was the result of long discussions both in the Working Group and at the Commission and accordingly it was generally agreed that it would be inappropriate to make any alterations at this stage.

298. An observer was of the opinion that the phrase "had reason to know" in article 13 of this draft was preferable to the phrase "ought to have known" which appears in article 7 (2) of CISG. In his view, the phrase "had reason to know" indicated the use of more objective standards than "ought to have known". However, the Working Group agreed that the definition of usages

²¹ The text of article (X) is found in para. 137.

in article 13 should conform as much as possible to the text of article 7 of CISG.

299. One representative stated that article 13 should be redrafted to make it conform more closely to the text of article 7 of CISG by deleting the words "practice or" from the definition of a usage.

Decision

300. The Working Group adopted the following text of article 13 (which was later renumbered as article 6):

"For the purposes of this Convention usage means any practice or method of dealing of which the parties knew or ought to have known and which in international trade is widely known to and regularly observed by parties to contracts of the type involved in the particular trade concerned."

Reorganization of provisions of the draft Convention

301. The Working Group adopted the recommendations of the Secretariat as to the reorganization and titles of the provisions of the draft Convention.²²

D. Future Work

302. The Working Group noted that it had completed the mandate given to it by the Commission in respect of formation and validity of contracts of international sale of goods.²³ Therefore, the Working Group would not need to hold a further session which had been scheduled for New York in January 1978 in case it could not have completed its mandate at its present session.

303. The Working Group further noted that the Commission at its tenth session had deferred until its eleventh session the question whether the rules on formation and validity of contracts for the international sale of goods should be the subject-matter of a Convention separate from the Convention on the International Sale of Goods.²⁴ Although this Convention had, for convenience, been prepared as a separate Convention, the Working Group requested the Secretariat to prepare an analysis of the drafting problems which would be entailed in combining the rules on formation and validity of contracts with the Convention on the International Sale of Goods and to present the analysis to the Commission at its eleventh session.

304. The Working Group noted that, in accordance with the practices established by the Commission, the draft Convention on the Formation of Contracts for the International Sale of Goods would be circulated to Governments and interested international organizations for comments and that these comments together with an analysis to be prepared by the Secretary-General would be submitted to the Commission at its eleventh session. The Working Group requested the Secretary-General to prepare a commentary on the draft Convention and

to circulate that commentary to Governments and interested international organizations to facilitate their consideration of the draft Convention.

305. The Working Group recalled the view expressed at its eighth session²⁵ that the Secretary-General should circulate the draft of a law for the unification of certain rules relating to validity of contracts of international sale of goods prepared by the International Institute for the Unification of Private Law to Governments and interested international organizations for their comments as to whether any matters in that text which had not been included in the draft Convention prepared by the Working Group should be included.

ANNEX*

Text of the draft Convention on the formation of contracts for the International Sale of Goods

PART I. SUBSTANTIVE PROVISIONS

CHAPTER I. SPHERE OF APPLICATION

Article 1. Scope

(1) This Convention applies to the formation of contracts of sale of goods between parties whose places of business are in different States:

- (a) When the States are Contracting States; or
- (b) When the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the offer, any reply to the offer, or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the proposed contract is to be taken into consideration.

(4) This Convention does not apply to the formation of contracts of sale:

- (a) Of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
- (b) By auction;
- (c) On execution or otherwise by authority of law;
- (d) Of stocks, shares, investment securities, negotiable instruments or money;
- (e) Of ships, vessels or aircraft;
- (f) Of electricity.

(5) This Convention does not apply to the formation of contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(6) The formation of contracts for the supply of goods to be manufactured or produced is to be considered as the formation of contracts of sale of goods unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(7) For the purposes of this Convention:

- (a) If a party has more than one place of business, the place of business is that which has the closest relationship to the proposed contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

²² These recommendations are set out in the report of the Secretary-General: analysis of unresolved matters in respect of the formation and validity of contracts for the international sale of goods (A/CN.9/WG.2/WP.28, para. 72). In addition the Secretariat recommended that the two new provisions, i.e. articles 7 A and 15 be renumbered as articles 11 and 5 and be entitled "Termination of offer by rejection" and "Fair dealing and good faith."

²³ The mandate given to the Working Group by the Commission is set out in para. 1 of the present report.

²⁴ UNCITRAL, report on the tenth session (1977), A/32/17, para. 33 (Yearbook . . . 1977, part one, II, A).

* Originally issued as A/CN.9/142/Add.1 on 18 November 1977.

²⁵ A/CN.9/128, para. 172.

(b) If a party does not have a place of business, reference is to be made to his habitual residence.

Article 2. *Autonomy of the parties*

(1) The parties may agree to exclude the application of this Convention.

(2) Unless the Convention provides otherwise, the parties may agree to derogate from or vary the effect of any of its provisions as may appear from the negotiations, the offer or the reply, the practices which the parties have established between themselves or from usages.

(3) Unless the parties have previously agreed otherwise, a term of the offer stipulating that silence shall amount to acceptance is not effective.

CHAPTER II. GENERAL PROVISIONS

Article 3. *Form*

(1) A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

(2) Paragraph (1) of this article does not apply to a contract of sale where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph.

Article 4. *Interpretation^a*

(1) Communications, statements and declarations by and conduct of a party are to be interpreted according to his intent where the other party knew or ought to have known what that intent was.

(2) If the preceding paragraph is not applicable, communications, statements and declarations by and conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 5. *Fair dealing and good faith^b*

In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith.

Article 6. *Usage*

For the purposes of this Convention usage means any practice or method of dealing of which the parties knew or ought to have known and which in international trade is widely known to and regularly observed by parties to contracts of the type involved in the particular trade concerned.

Article 7. *Communications*

(1) For the purposes of this Convention an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

(2) Paragraph (1) of this article does not apply to an offer, declaration of acceptance or any other indication of intention if any of them is made in any other form than in writing where any party has his place

^a The Working Group on the International Sale of Goods noted that article 4 had no equivalent in the draft Convention on the International Sale of Goods.

^b The Working Group on the International Sale of Goods noted that article 5 had no equivalent in the draft Convention on the International Sale of Goods.

of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph.

CHAPTER III. FORMATION OF THE CONTRACT

Article 8. *Offer^c*

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

(3) A proposal is sufficiently definite if it indicates the kind of goods and fixes or makes provision for determining the quantity and the price. Nevertheless, if a proposal indicates the intention to conclude the contract even without making provision for the determination of the price, it is considered as proposing that the price be that generally charged by the seller at the time of the conclusion of the contract or, if no such price is ascertainable, the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.

Article 9. *Time of effect of offer*

The offer becomes effective when it reaches the offeree. It is withdrawn if the withdrawal reaches the offeree before or at the same time as the offer even if it is irrevocable.

Article 10. *Revocability of offer*

(1) The offer is revoked if the revocation reaches the offeree before he has dispatched his acceptance.

(2) However, an offer cannot be revoked:

(a) If the offer indicates that it is firm or irrevocable; or

(b) If the offer states a fixed period of time for acceptance; or

(c) If it was reasonable for the offeree to rely upon the offer being held open and the offeree has acted in reliance on the offer.

Article 11. *Termination of offer by rejection*

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Article 12. *Acceptance*

(1) A declaration or other conduct by the offeree indicating assent to an offer is an acceptance. Silence shall not in itself amount to acceptance.

(2) Subject to paragraph 3 of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. It is not effective if the indication of assent does not reach the offeror within the time he has fixed or if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed provided that the act is performed within the period of time laid down by the second and third sentences of paragraph 2 of this article.

(4) This article does not apply to the acceptance of an offer in so

^c Ghana and the Union of Soviet Socialist Republics expressed formal reservations to the second sentence of paragraph (3) of this article.

far as the acceptance is allowed otherwise than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph.

Article 13. Additions or modifications to the offer

(1) A reply to an offer containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

Article 14. Time fixed for acceptance

(1) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of the period for acceptance at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

Article 15. Late acceptance

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or dispatches a notice to that effect.

(2) If the letter or document containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late

acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree orally that he considers his offer as having lapsed or dispatches a notice to that effect.

Article 16. Withdrawal of acceptance

An acceptance is withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 17. Time of conclusion of contract

A contract of sale is concluded at the moment that an acceptance of an offer is effective in accordance with the provisions of this Convention.

Article 18. Modification and rescission of contract

(1) The contract may be modified or rescinded by the mere agreement of the parties.

(2) A written contract which contains a provision requiring any modification or rescission to be in writing may not be otherwise modified or rescinded. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

(3) This article does not apply to the modification or rescission of a contract in so far as it is allowed otherwise than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph.

Article (X). Declarations

A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may at the time of signature, ratification or accession make a declaration to the effect that the provisions of this Convention, in so far as they allow the conclusion, modification or rescission of the contract, offer, acceptance or any other indication of intention to be made otherwise than in writing shall not apply if one of the parties has his place of business in the declarant State.

B. Working papers submitted to the Working Group on the International Sale of Goods at its ninth session

1. DRAFT COMMENTARY ON ARTICLES 1 TO 13 OF THE DRAFT CONVENTION ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AS APPROVED OR DEFERRED FOR FURTHER CONSIDERATION BY THE WORKING GROUP ON THE INTERNATIONAL SALE OF GOODS AT ITS EIGHTH SESSION*

Introduction

1. At its eighth session the Working Group on the International Sale of Goods requested the Secretariat to prepare a draft commentary on the draft Convention on the Formation of Contracts for the International Sale of Goods as approved or deferred for further consideration by the Working Group.¹

2. Article 14 of the draft Convention has been considered in the report of the Secretary-General dealing with unresolved matters in respect of formation and validity of contracts (A/CN.9/WG.2/WP.28).^{**}

3. The draft commentary has been prepared on the

text of the draft Convention as it appears in annex I to the report of the Working Group on the work of its eighth session (A/CN.9/128, annex I).^{***} Generally, the existence of square brackets has been ignored in the preparation of this draft commentary which seeks to explain the text as it currently exists.

2. DRAFT COMMENTARY ON ARTICLES 1 TO 13 OF THE DRAFT CONVENTION ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AS APPROVED OR DEFERRED FOR FURTHER CONSIDERATION BY THE WORKING GROUP ON THE INTERNATIONAL SALE OF GOODS AT ITS EIGHTH SESSION²

ARTICLE 1

“[Article 1 (alternative 1)]

“This Convention applies to the formation of contracts of sale of goods which, if they were concluded, would be governed by the Convention on the International Sale of Goods.]

^{***} Yearbook . . . 1977, part two, I, B.

² Those matters which have not been resolved by the Working Group are in square brackets.

* Originally issued as A/CN.9/WG.2/WP.27 on 16 August 1977.

** Reproduced in this volume, part two, I, B, 2 below.

¹ See report of the Working Group on the International Sale of Goods on the work of its eighth session, A/CN.9/128, para. 174 (Yearbook . . . 1977, part two, I, A).

[Article 1 (alternative 2)]

“(1) This Convention applies to the formation of contracts of sale of goods entered into by parties whose places of business are in different States:

“(a) When the States are Contracting States; or

“(b) When the rules of private international law lead to the application of the law of a Contracting State.

“(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the offer, any reply to the offer, or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

“(3) This Convention does not apply to the formation of contracts of sale:

“(a) Of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, did not know and had no reason to know that the goods were bought for any such use;

“(b) By auction;

“(c) On execution or otherwise by authority of law;

“(d) Of stocks, shares, investment securities, negotiable instruments or money;

“(e) Of ships, vessels or aircraft;

“(f) Of electricity.

“(4) This Convention does not apply to the formation of contracts in which the predominant part of the obligations of the seller consists in the supply of labour or other services.

“(5) The formation of contracts for the supply of goods to be manufactured or produced is to be considered as the formation of contracts of sale of goods unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

“(6) For the purposes of this Convention:

“(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the proposed contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

“(b) If a party does not have a place of business, reference is to be made to his habitual residence;

“(c) Neither the nationality of the parties nor the civil or commercial character of the parties or of the proposed contract is to be taken into consideration.”

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), article 1.

Convention on the Limitation Period in the International Sale of Goods (Limitation Convention), articles 2, 3, 4, 6.

Draft Convention on the International Sale of Goods (CISG), articles 1, 2, 3, 5.

Commentary

1. This article states the rules for determining whether this Convention is applicable to the formation of a contract of sale of goods and sets out those contracts the formation of which is excluded from the application of this Convention.

Text for use by those States which adopt CISG [alternative 1]

2. Alternative 1 is for use by those States which adopt the proposed Convention on the International Sale of Goods (CISG).

3. In order to be sure that the same criteria are employed to determine whether the present Convention and the Convention on the International Sale of Goods would apply to a transaction, alternative 1 provides that if a contract of sale would be governed by CISG, the present Convention applies to the formation of the contract. As a result, if both parties to the proposed transaction were from States which had adopted CISG but only one of them had adopted the present Convention, the present Convention would apply to the formation of the contract in the courts of the State which had adopted the present Convention, but it would not apply to the formation of the contract in the State which had not adopted the present Convention unless a Court in that State or in a third State selected the law of a Contracting State as the applicable law to govern the formation of the contract.

Text for use by those States which do not adopt CISG [alternative 2]

4. Alternative 2 is for use by those States which do not adopt CISG. It reproduces articles 1, 2, 3 and 5 of CISG, with such minor changes as are necessary for it to apply to the formation of contracts rather than to the contract itself.

Action by the Working Group

5. The Working Group decided that these draft provisions should be placed in square brackets to indicate that they would have to be reconsidered in the light of any changes which the Commission might make to the scope of application of the draft CISG established by the Working Group at its seventh session (A/CN.9/116, annex I).*

6. The Commission, at its tenth session in Vienna from 23 May to 17 June 1977, made no changes in substance to articles 1, 2, 3 and 5 of the draft CISG. It made two changes in presentation:

Article 6(c) in the text as recommended by the Working Group on the International Sale of Goods (A/CN.9/116) became article 1(3) of CISG. The equivalent text in the draft Convention on the Formation of Contracts for the International Sale of Goods is article 1(6)(c).

The words “did not know and had no reason to know” in article 2(a) of the draft CISG (identical to article 1(3)(a) of the draft Convention on the Formation of Contracts for the International Sale of Goods) were replaced by “neither knew nor ought to have known”.

* Yearbook . . . 1976, part two, I, 2.

"ARTICLE 2

"(1) The parties may [agree to] exclude the application of this Convention.

"(2) Unless the Convention provides otherwise, the parties may [agree to] derogate from or vary the effect of any of its provisions as may appear from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usages.

"(3) However, a term of the offer stipulating that silence shall amount to acceptance is invalid."

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 2.

Limitation Convention, article 3 (3).

Draft CISG, article 4.

Commentary

1. Article 2 states the extent to which the parties may exclude the application of this Convention and derogate from or vary the effect of any of its provisions.

Exclusion of the application of the Convention, paragraph (1).

2. Paragraph (1) states that the parties may exclude the application of the Convention as a whole. The most likely manner in which the parties would act to exclude the application of this Convention would be by the choice of a specific national law to govern the formation of the contract. It would be a matter of interpretation of the intention of the parties in a given case as to whether the choice of a specific national law to govern "the contract" was also a choice of that national law to govern the formation of the contract.

3. If the parties exclude the application of this Convention without specifying the national law to be applied, the rights and obligations of the parties in respect of the formation of the contract would be governed by the national law made applicable by the rules of private international law.

Derogations from the provisions of this Convention, paragraph (2)

4. Paragraph (2) enables the parties, unless the Convention otherwise provides, to derogate from or vary any of the individual provisions of the Convention. The paragraph indicates the sources from which this intention can be derived. The inclusion of practices which the parties have established between themselves would enable a Court to take account of the manner in which prior contracts between the parties have been formed.

5. Therefore, even though it may not be necessary for the parties to agree on such matters as the delivery date or the date of payment of the price for the offer to be sufficiently definite, if one of the parties insists on prior agreement on these points, no contract will be concluded until such agreement is reached.

6. Similarly, if the offeror specifies that the accept-

ance must be sent by air mail and that it must arrive by the end of the business day on 30 June, a purported acceptance which was delivered in person by the end of the business day on 30 June would not constitute an acceptance under the terms of paragraph (2), unless the terms of the offer were interpreted to mean only that the acceptance must arrive by the close of business on 30 June and that the term concerning air mail was used only to emphasize that a speedy reply was required.

Silence as acceptance, paragraph (3)

7. Paragraph (3) states that a term of the offer which stipulates that silence shall amount to acceptance is invalid. This is the only specific restriction on the right of the parties either to modify the substantive provisions of this Convention or to specify the act which will constitute an offer or an acceptance.

8. It should be noted that silence may constitute acceptance if that mode of acceptance was agreed to in the negotiations, as a practice which the parties have established between themselves or is a mode of acceptance sanctioned by usage.

Example 2A. For the past 10 years the buyer regularly ordered goods that were to be shipped throughout the period of six to nine months following each order. After the first few orders the seller never acknowledged the orders but always shipped the goods as ordered. On the occasion in question the seller neither shipped the goods nor notified the buyer that he would not do so. The buyer would be able to sue for breach of contract on the basis that a practice had been established between the parties that the seller did not need to acknowledge the order and, in such a case, the silence of the seller constituted acceptance of the offer.

Example 2B. One of the terms in a concession agreement was that the seller was required to respond to any orders placed by the buyer within 14 days of receipt. If he did not respond within 14 days, the order would be deemed to have been accepted by the seller. On 1 July the seller received an order for 100 units from the buyer. On 25 July the seller notified the buyer that he could not fill the order. In this case a contract had been concluded on 15 July for the sale of 100 units because the concession agreement, as part of the preliminary negotiations, provided that a non-response from the seller would be deemed to be acceptance.

ARTICLE 3

"[Article 3 (alternative 1)]

"An offer or an acceptance need not be evidenced by writing and shall not be subject to any other requirement as to form. In particular, they may be proved by means of witnesses.]

"[Article 3 (alternative 2)]

"Neither the formation or validity of a contract nor the right of a party to prove its formation or any of its provisions depends upon the existence of a writing or any other requirement as to form. The formation of the contract, or any of its provisions, may be proved by means of witnesses or other appropriate means.]"

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 3.

Uniform Law on the International Sale of Goods (ULIS), article 15.

Draft CISG, article 11.

Actions of the Working Group and of the Commission

1. The Working Group decided to place both alternatives of article 3 in square brackets because the Commission would consider article 11 of the draft CISG (A/CN.9/116, annex I) at its tenth session.

2. The Commission at its tenth session adopted the following text of article 11 of CISG:

"Article 11"

"(1) A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

"(2) Paragraph (1) of this article does not apply to a contract of sale where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention."

3. Article (X), to which article 11 of CISG refers, is as follows:

"Article X"

"A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing, may at the time of signature, ratification or accession, make a declaration to the effect that article 11, paragraph (1) shall not apply to any sale involving a party having his place of business in a State which has made such a declaration."

4. For the purposes of this commentary it has been assumed that the Working Group will adopt article 11 of CISG as article 3 of this Convention with the exception that paragraph (2) would read: "Paragraph (1) of this article does not apply to the formation of a contract of sale"

*Commentary**General rule as to a writing, paragraph (1)*

5. Paragraph (1) states a general rule that a contract of sale subject to this Convention need not be concluded in or evidenced by writing. This general rule would displace any otherwise applicable rule of national law that contracts of sale of particular kinds of goods or for more than a given monetary value must either be concluded in or evidenced by writing in order to be valid or enforceable between the parties.

6. The parties could, however, in accordance with article 2, agree that no communication is to be regarded as an offer or an acceptance unless it is in writing. The same result might occur because of the practices which the parties have established between themselves or because of a usage.

7. Moreover, any administrative or criminal sanctions for breach of the rules of any State requiring that such contracts be in writing, whether for purposes of

administrative control of the buyer or seller, for purposes of exchange control regulations or otherwise, would still be enforceable against a party who concluded the non-written contract even though the contract itself would be enforceable between the parties.

The requirement as to form, paragraph (1)

8. The provision that an offer or an acceptance is not subject to "any other requirement as to form" refers to requirements such as the placing of seals on a document, its witnessing or authentication by a notary or the use of other special forms.

Proof by means of witnesses, paragraph (1)

9. The provision which enables the existence and content of the offer and the acceptance to be proved by any means including witnesses is intended to apply especially to those countries in which the requirement that there be a record of the contract in writing goes to the proof of the existence of the contract rather than to the proper form of the offer and acceptance. Article 3 might otherwise be interpreted in the courts of those countries in such a manner so as not to achieve the result intended by the first sentence of the article.

10. Although article 3 of ULF text could be interpreted to mean only that the existence of the offer and acceptance may be proved by means other than by a writing, it must be understood to mean also that the terms of the offer and acceptance may be proved by means of witnesses or any other appropriate means.

Declaration of non-application, paragraph (2)

11. Some countries consider it an important matter of public policy that contracts of sale be concluded in or evidenced by writing. Paragraph (2), therefore, provides that the general rule in paragraph (1) does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X) to the effect that paragraph (1) shall not apply.

"ARTICLE 3A"

"(1) The contract may be modified or rescinded merely by agreement of the parties.

"(2) A written contract which contains a provision requiring any modification or rescission to be in writing may not be otherwise modified or rescinded. [However, a party may be precluded by his action from asserting such a provision to the extent that the other party has relied to his detriment on that action.]"

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

UNCITRAL Arbitration Rules, articles 1 and 30.

Commentary

1. This article governs the modification and rescission of a contract.

General rule, paragraph (1)

2. Paragraph (1), which states the general rule that a

contract may be modified or rescinded merely by agreement of the parties, is intended to eliminate an important difference between the civil law and the common law in respect of the modification of existing contracts. In the civil law an agreement between the parties to modify the contract is effective if there is sufficient *cause* even if the modification relates to the obligations of only one of the parties. In the common law a modification of the obligations of only one of the parties is in principle not effective because consideration is lacking.

3. The modifications envisaged by this provision are technical modifications in specifications, delivery dates, or the like which frequently arise in the course of performance of commercial contracts. Even if such modifications of the contract may increase the costs of one party, or decrease the value of the contract to the other, the parties may agree that there will be no change in the price. Such agreements according to article 3A (1) are effective, thereby overcoming the common law rule that consideration is required.

Modification or rescission of a written contract, paragraph (2)

4. Although the present text of article 3 of this draft and article 11 of CISG provide that a contract need not be in writing, the parties can reintroduce such a requirement. A similar problem is the extent to which a contract which specifically excludes modification or rescission unless in writing, can be modified or rescinded orally.

5. In some legal systems a contract can be modified orally in spite of a provision to the contrary in the contract itself. It is possible that such a result would follow from article 3 which provides that a contract governed by this Convention need not be evidenced by writing. However, article 3A (2) provides that a written contract which excludes any modification or rescission unless in writing cannot be otherwise modified or rescinded.

6. In some cases a party might act in such a way that it would not be appropriate to allow him to assert such a provision against the other party. Therefore, paragraph (2) goes on to state that to the extent the other party has relied to his detriment on such action, the first party cannot assert the provision.

7. It should be noted that the party who wishes to assert the provision in the contract which requires any modification or rescission to be in writing is precluded from doing so only to the extent that the other party has relied on actions of the first party and that, in so doing, he has suffered a detriment. If there has either been no reliance on the actions of the first party or no detriment in so relying, the first party would not be precluded from relying on the contract provision.

“ARTICLE 4

“(1) A proposal for concluding a contract [addressed to one or more specific persons] constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

“(2) An offer is sufficiently definite if expressly or impliedly it indicates the kind of goods and fixes or makes provision for determining the quantity and the

price. [Nevertheless, if the offer indicates the intention to conclude the contract even without making provision for the determination of the price, it is considered as a proposal that the price be that generally charged by the seller at the time of the conclusion of the contract or, if no such price is ascertainable, the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.]”

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 4.

Draft CISG, article 37.

Commentary

1. Article 4 states the conditions that are necessary in order that a proposal to conclude a contract constitutes an offer.

Addressee of an offer, paragraph (1)

2. Paragraph (1) provides that the proposal must be “addressed to one or more specific persons” in order to constitute an offer. These words are intended to exclude “public offers”, in the sense of an offer to unnamed members of the general public, from the ambit of the Convention. This will reverse the law in some countries in which such “public offers” are considered as offers if they meet the other criteria of an offer.

3. It should be noted, however, that an offer can be made to a large number of persons simultaneously so long as those persons are “specific persons”. Therefore, an advertisement or catalogue of goods available for sale sent in the mail directly to the addressees would be sent to “specified persons”, whereas the same advertisement or catalogue distributed to the public at large would not. However, such an advertisement or catalogue would constitute an offer only if, in addition, it indicated an intention of the sender to be bound and if it was sufficiently definite.

Intention to be bound, paragraph (1)

4. In order for the proposal for concluding a contract to constitute an offer, it must indicate “the intention of the offeror to be bound in case of acceptance”. Since there are no particular words which must be used to indicate such an intention, it may sometimes require a careful examination of the “offer” in order to determine whether such an intention existed. This is particularly true if one party claims that a contract was concluded during negotiations which were carried on over an extended period of time, and no single communication was labeled by the parties as an “offer” or as an “acceptance”. The requisite intention to be bound in case of acceptance can be established also from the surrounding circumstances or from the preliminary negotiations or usage.³

³ Article 4 (2) of ULF made this clear. It enabled a proposal for concluding a contract to be “interpreted by reference to and supplemented by the preliminary negotiations, any practices which the parties have established between themselves, usage and any applicable legal rules for contracts of sale”. See also article 14 of the draft Convention prepared by the Working Group which is discussed in Report of the Secretary-General: analysis of unresolved matters in respect of the formation and validity of contracts for the international sale of goods, A/CN.9/WG.2/WP.28 (reproduced in the present volume, part two, I, B, 2 below).

5. The requirement that the offeror has manifested his intention to be bound refers to his intention to be bound to the eventual contract if there is an acceptance. It is not necessary that he intends to be bound by the offer, i.e. that he intends the offer to be irrevocable. As to the revocability of offers, see article 5.

An offer must be sufficiently definite, paragraphs (1) and (2)

6. Paragraph (1) states that a proposal for concluding a contract must be "sufficiently definite" in order to constitute an offer. Paragraph (2) states that an offer is sufficiently definite if expressly or impliedly it:

Indicates the kind of goods, and

Fixes or makes provision for determining the quantity, and

Fixes or makes provision for determining the price.

The fact that the proposal for concluding a contract is sufficiently definite may be established from the surrounding circumstances or from the preliminary negotiations or usage.⁴

Quantity of the goods, paragraph (2)

7. Although, according to article 4 (2), the proposal for concluding a contract will be sufficiently definite to constitute an offer if it fixes or makes provision for the quantity of goods, the means by which the quantity is to be determined is left to the entire discretion of the parties. It is even possible that the formula used by the parties may permit the parties to determine the exact quantity to be delivered under the contract only during the course of performance.

8. For example, an offer to sell to the buyer "all I have available" or an offer to buy from the seller "all my requirements" during a certain period would be sufficient to determine the quantity of goods to be delivered. Such a formula should be understood to mean the actual amount available to the seller or the actual amount required by the buyer in good faith.

9. It appears that most, if not all, legal systems recognize the legal effect of a contract by which one party agrees to purchase, for example, all of the ore produced from a mine or to supply, for example, all of the supplies of petroleum products which will be needed for resale by the owner of a service station. In some countries such contracts are considered to be contracts of sale. In other countries such contracts are denominated as concession agreements or otherwise, with the provisions in respect of the sale of the goods considered to be ancillary provisions. In either case, the contract would be recognized as legally valid.

Price, paragraph (2)

10. Although the first sentence of article 4 (2) provides that the proposal for concluding a contract must fix or make provision for determining the price in order for it to constitute an offer, the second sentence indicates that this is not necessary "if the offer indicates the intention to conclude the contract even without making provision for the determination of the price". In such a case, the last portion of the second sentence repeats the

language of article 37 of the draft Convention on the International Sale of Goods which provides the formula for determining the price.

11. It should be noted that the formula to be used if the second sentence of article 4 (2) applies would determine the price on the basis of that prevailing at the time of the conclusion of the contract, i.e. "at the moment the indication of assent is communicated to the offeror". If at that moment there was no price generally charged by the seller or generally prevailing for such goods sold under comparable circumstances, the second sentence of article 4 (2) could have no effect and no legally effective offer would have been made.

"ARTICLE 5

"(1) The offer becomes effective when it has been communicated to the offeree. It can be withdrawn if the withdrawal is communicated to the offeree before or at the same time as the offer [even if it is irrevocable].

"(2) The offer can be revoked if the revocation is communicated to the offeree before he has dispatched his acceptance [, shipped the goods or paid the price].

"(3) However, an offer cannot be revoked:

"(a) If the offer expressly or impliedly indicates that it is firm or irrevocable; or

"(b) If the offer states a fixed period of time for [acceptance] [irrevocability]; or

"(c) If it was reasonable for the offeree to rely upon the offer being held open and the offeree has altered his position to his detriment in reliance on the offer."

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 5.

Commentary

1. Article 5 states the time at which an offer becomes effective and the conditions under which it can be revoked.

Time at which offer is effective, paragraph (1)

2. Article 5 (1) provides that an offer becomes effective when it has been communicated to the offeree. Until this time the offeree may not accept the offer and the offeror may withdraw it, even if it is irrevocable. Therefore, if the offeree, having learned of the dispatch of the offer by some means which did not constitute "communication"⁵ of the offer to him, purported to accept the offer, the offeror could nevertheless withdraw it until there was "communication".

Revocation of an offer, paragraph (2)

3. Article 5 (2) states that offers are in general revocable. However, the remainder of article 5 (2) and article 5 (3) state several situations in which the offer is or becomes irrevocable.

4. The three situations set forth in article 5 (2) which

⁴ Ibid.

⁵ The concept of communication is defined in article 12.

render a revocable offer irrevocable should be read in conjunction with article 8 (1 *bis*) and (1 *ter*). Article 8 (1 *bis*) states the general rule that an acceptance becomes effective at the moment it is communicated to the offeror. As applied to the situation in which the offeree does not dispatch an acceptance but instead commences performance by shipping the goods or paying the price, article 8 (1 *ter*) provides that the acceptance is effective at the moment notice of that acceptance is communicated to the offeror.

5. Because the receipt theory of acceptance set out in article 8 can cause the offeree to suffer loss if the offeror revokes the offer after the offeree has dispatched his acceptance, shipped the goods or paid the price, article 5 (2) states that once any one of those three acts has occurred the offer becomes irrevocable. However, the contract is not concluded until the offer has been accepted in accordance with article 8.

Irrevocable offers, paragraph (3)

6. Article 5 (3) sets forth three situations in which the irrevocability of the offer is a result of the nature of the offer. The first two would not seem to call for comment, i.e. that the offer cannot be revoked if it expressly or impliedly indicates that it is firm or irrevocable or if it states a fixed time for [irrevocability].⁶

7. An alternative provision in article 5 (3) (b) provides that the offer cannot be revoked if the offer states a fixed time for [acceptance]. Therefore, if the offer states "you have until 1 June to accept this offer" or "if I have not received your acceptance by 1 June, I will send the goods to someone else", the offer is irrevocable until 1 June.

8. The third situation in which the offeror cannot revoke his offer under article 5 (3) is that it was reasonable for the offeree to rely upon the offer being held open and the offeree has altered his position in reliance on the offer. This would be of particular importance where the offeree would have to engage in extensive investigation to determine whether he should accept the offer. Even if the offer does not indicate that it is irrevocable, it should be irrevocable for the period of time necessary for the offeree to make his determination.

"ARTICLE 6

"A contract of sale is concluded at the moment that an acceptance of an offer is effective in accordance with the provisions of this Convention."

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

None.

Commentary

1. Article 6 specifically states that which would otherwise have undoubtedly been understood to be the rule, i.e. that the contract is concluded at the moment that an acceptance of an offer is effective in accordance with the provisions of this Convention. It was thought desirable to state this rule explicitly because of the large

⁶ This statement is based, *inter alia*, on the second alternative text of article 5 (3) (b). The first alternative text is commented on in paragraph 7.

number of rules in this Convention and CISG which depend on the time of the conclusion of the contract.

2. On the other hand article 6 does not state a rule for the place at which the contract is concluded. Such a provision is unnecessary since no other provisions of this Convention or of the CISG depend upon the place at which the contract is concluded. Furthermore the consequences in regard to conflicts of law and judicial jurisdiction which might arise from fixing the place at which the contract is concluded are uncertain and might be unfortunate. Therefore, it was thought best to leave this matter to the applicable national law.

"ARTICLE 7

"(1) A reply to an offer containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

"[(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.]

"[(3) If a confirmation of a prior contract of sale is sent within a reasonable time after the conclusion of the contract, any additional or different terms in the confirmation [which are not printed] become part of the contract unless they materially alter it, or notification of objection to them is given without delay after receipt of the confirmation. [Printed terms in the confirmation form become part of the contract if they are expressly or impliedly accepted by the other party.]]"

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 7.

Commentary

General rule, paragraph (1)

1. Article 7 (1) states that a purported acceptance which adds to, limits or otherwise modifies the offer to which it is directed is a rejection of the offer and constitutes a counter-offer.

2. This provision reflects traditional theory that contractual obligations arise out of expressions of mutual agreement. Accordingly, an acceptance must comply exactly with the offer. Should the purported acceptance not agree completely with the offer, there is no acceptance but the making of a counter-offer which requires acceptance by the other party for the formation of a contract.

3. Although the explanation for the rule in article 7 (1) lies in a widely held view of the nature of a contract, the rule also reflects the reality of the common factual situation in which the offeree is in general agreement with the terms of the offer but wishes to negotiate in regard to certain aspects of it. There are, however, other common factual situations in which the traditional rule, as expressed in article 7 (1), does not give desirable results. Articles 7 (2) and (3) create exceptions to article 7 (1) in regard to two of these situations.

Non-material alterations, paragraph (2)

4. Article 7 (2) contains rules dealing with the situation where a reply to an offer is expressed and intended as an acceptance but contains additional or different terms which however do not materially alter the terms of the offer. For example, an offer stating that the offeror has 50 tractors available for sale at a certain price is accepted by a telegram which adds "ship immediately" or "ship draft against bill of lading inspection allowed".

5. In most cases in which a reply purports to be an acceptance any additional or different terms in the reply will not be material and, therefore, under article 7 (2) a contract will be concluded on the basis of the terms in the offer as modified by the terms in the acceptance. If the offeror objects to the terms in the acceptance, further negotiations will be necessary before a contract is concluded.

6. If the reply contains a material alteration, the reply would not constitute an acceptance but would constitute a counter-offer. If the original offeror responds to this reply by shipping the goods or paying the price, a contract may eventually be formed by virtue of article 8 (1 *ter*).⁷ In such a case the terms of the contract would be those of the counter-offer.

Confirmation of the conclusion of a contract, paragraph (3)

7. Typically, after the conclusion of an oral contract or after the conclusion of a contract by telegram or telex, one or both of the parties will send to the other a confirmation of the contract. The purpose of the confirmation is not only to produce a paper record of the transaction, but also to inform the other party of the terms of the contract as those terms were understood by the party sending the confirmation. In addition, it is common for invoices sent by the seller to contain general conditions of sale which were not discussed by the parties prior to the conclusion of the contract. Article 7 (3) recognizes an obligation on the part of the party receiving the confirmation or the invoice to verify whether those terms are consistent with his understanding of the contract and to object if they are not.

8. Article 7 (3) distinguishes between the additional or different terms in the confirmation or invoices which are printed and those terms which are not printed. The employees of both parties will seldom, if ever, read and compare the printed terms. All that is of importance to them are the terms which have been filled in. If those terms are in accord with their understanding of the contract as made orally, by telegram or telex, or if those terms contain only such additions as "ship immediately" or "ship draft against bill of lading inspection allowed", no objection will usually be made even if the printed terms contain important additions or modifications.

9. As to the non-printed terms, article 7 (3) adopts the same solution as that in article 7 (2), i.e. they become part of the contract unless they materially alter it, or notification of objection is given without delay after receipt of the confirmation or invoice.

⁷ Under article 5 (2) the offer, i.e. the counter-offer in this example, becomes irrevocable upon the shipment of the goods or the payment of the price.

10. On the other hand the printed terms in the confirmation form become part of the contract only if they are expressly or impliedly accepted by the other party. Such implied acceptance might be evidenced by showing a past practice of contracting on those terms or by showing actions in respect of this contract in a manner consistent with those terms. In any case, it would be the burden of the party who had sent the confirmation form to show that the other party had in some manner accepted the printed terms.

11. It should be noted that article 7 (3), unlike article 7 (2), does not place in question the existence of the contract. The contract would have been concluded by the prior oral, telegraphic or telex acceptance. Article 7 (3) governs only the question of the extent to which the additional or different terms in the confirmation become part of the contract.

"Article 8"

"(1) A declaration [or other conduct] by the offeree indicating assent to an offer is an acceptance.

"(1 *bis*) Acceptance of an offer becomes effective at the moment the indication of assent is communicated to the offeror. It is not effective if the indication of assent is not communicated within the time the offeror has fixed or if no time is fixed, within a reasonable time [, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror]. In the case of an oral offer, the acceptance must be immediate unless the circumstances show that the offeree is to have time for reflection.

"[(1 *ter*) If an offer is irrevocable because of shipment of the goods or payment of the price as referred to in paragraph (2) of article 5, the acceptance is effective at the moment notice of that acceptance is communicated to the offeror. It is not effective unless the notice is given promptly after that act and within the period laid down in paragraph (1 *bis*) of the present article.]

"(2) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the hour of the day the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror in a telephone conversation, telex communication or other means of instantaneous communication, begins to run from the hour of the day that the offer is communicated to the offeree.

"(3) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of such period at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period."

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, articles 6 and 8.

UNCITRAL Arbitration Rules, article 2 (2).

Commentary

1. Article 8 sets out the conduct of the offeree which constitutes an acceptance and the moment at which the acceptance is effective.

Acts constituting an acceptance, paragraph (1)

2. Most acceptances are in the form of a declaration by the offeree indicating assent to an offer. However, article 8 (1) recognizes that other conduct by the offeree indicating assent to the offer also may constitute an acceptance. Articles 8 (1 *bis*) and 8 (1 *ter*) indicate that one particular form of other conduct which is envisaged is the communication to the offeree that the goods have been shipped or that payment has been made.

Time at which acceptance is effective, paragraph (1 bis)

3. Some legal systems consider the acceptance of an offer to be effective on dispatch of the notice of acceptance while other legal systems consider it to be effective only on receipt by the offeror. This Convention adopts the receipt theory by virtue of the definition of "communicated" in article 12.

4. Article 6 provides that the contract is concluded at the moment that an acceptance of an offer is effective in accordance with article 8 (1 *bis*) and article 8 (1 *ter*).

5. The offeree's indication of assent to an offer can be communicated by a third party, such as a bank through whom payment has been made; it need not be communicated by the offeree himself.

6. Article 8 (1 *bis*) states the traditional rule that an acceptance is effective only if it is communicated, i.e., if it arrives, within the time fixed by the offeror or, if no such time is fixed, within a reasonable time. It should be noted, however, that article 9 provides that an acceptance which arrives late is, or may be, considered to have been communicated in due time. However, the sender-offeree still bears the risk of non-arrival of the acceptance.

Acceptance of an offer made irrevocable by shipment of the goods or payment of the price, paragraph (1 ter)

7. Article 5 (2) provides, in part, that once the offeree ships the goods or pays the price, the offer becomes irrevocable even though the offeree has not sent a declaration of acceptance to the offeror. However, article 8 (1 *bis*) provides the acceptance is not effective, and therefore, the contract is not concluded, until the offeror receives a notice of the acceptance.

8. The notice of the acceptance may consist of a declaration of acceptance pursuant to article 8 (1). However, it may also consist of a notice to the offeror that the goods have been shipped or that the price has been paid, such acts constituting "other conduct" as referred to in article 8 (1). Such a notice may come directly from the offeree or it may come from a third party, such as the bank which has paid or received the payment of the price.

9. The second sentence of article 8 (1 *ter*) is intended to preclude the possibility that an offeror would not know for an appreciable period of time that his offer, which had been revocable at the time made, was irrevocable because of the shipment of the goods or

payment of the price by the offeree. Therefore, where the offer becomes irrevocable in that manner, the acceptance is not effective unless notice of the shipment or payment is given promptly after that fact. Notice given later than "promptly" would constitute a late acceptance with the consequences described in article 9.

Commencement of period of time to accept, paragraph (2)

10. Article 8 (2) provides a mechanism for the calculation of the commencement of the period of time during which an offer can be accepted.

11. If a period of time for acceptance is of a fixed length, such as 10 days, it is important that the point of time at which the 10-day period commences be clear. Therefore, article 8 (2) provides that a period of time for acceptance fixed by an offeror in a telegram "begins to run from the hour of the day the telegram is handed in for despatch".

12. In the case of a letter the time runs "from the date shown on the letter" unless no such date is shown, in which case it runs "from the date shown on the envelope". This order of preference was chosen for two reasons: first, the offeree may discard the envelope but he will have available the letter as the basis for calculating the end of the period during which the offer can be accepted and second, the offeror will have a copy of the letter with its date but will generally have no record of the date on the envelope. Therefore, if the date on the envelope controlled, the offeror could not know the termination date of the period during which the offer could be accepted.

"Article 9"

"(1) If the acceptance is late, the offeror may nevertheless consider it to have arrived in due time on condition that he promptly so informs the acceptor orally or by dispatch of a notice.

"[(2) If however the acceptance is communicated late, it shall be considered to have been communicated in due time, if the letter or document which contains the acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have been communicated in due time; this provision shall not however apply if the offeror has promptly informed the acceptor orally or by despatch of a notice that he considers his offer as having lapsed.]"

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 9.

Commentary

1. Article 9 deals with acceptances that arrive after the expiration of the time for acceptance.

Power of offeror to consider acceptance as having arrived in due time, paragraph (1)

2. If the acceptance is late, the offer lapses and no contract is concluded by the arrival of the acceptance. However, article 9 (1) provides that the late acceptance becomes an effective acceptance if the offeror promptly

informs the acceptor orally or by the dispatch of a notice that he considers the acceptance to have arrived in due time.

3. Article 9(1) differs slightly from the theory found in many countries that a late acceptance functions as a counter-offer. Under this paragraph, as under the theory of counter-offer, a contract is concluded only if the original offeror informs the original offeree of his intention to be bound by the late acceptance. However, under this paragraph it is the late acceptance which becomes the effective acceptance at the moment the original offeror informs the original offeree of his intention either orally or by the dispatch of a notice whereas under the counter-offer theory it is the notice by the original offeror of his intention which becomes the acceptance and this acceptance is effective only upon its arrival.

Acceptances which are late because of a delay in transmission, paragraph (2)

4. A different rule prevails if the letter or document which contains the late acceptance shows that it was sent in such circumstances that if its transmission had been normal, it would have been communicated in due time. In such case the late acceptance is considered to have arrived in due time, and the contract is concluded as of the moment of the communication of the acceptance, unless the offeror promptly notifies the offeree that he considers the offer as having lapsed.

5. Therefore, if the letter or document which contains the late acceptance shows that it was sent in such circumstances that if its transmission had been normal, it would have been communicated in due time, the offeror must send a notice to the offeree to prevent a contract from being concluded. If the letter or document does not show such proper dispatch and the offeror wishes the contract to be concluded, he must send a notice to the offeree that he considers the acceptance to have arrived in due time.

"Article 10

"An acceptance cannot be revoked except by a revocation which is communicated to the offeror before or at the same time as the acceptance becomes effective."

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 10.

Commentary

Article 10 provides that an acceptance cannot be revoked after it has become effective. This provision is a consequence of the rule in article 6 that a contract of sale is concluded at the moment the acceptance becomes effective.⁸

"Article 11

"The formation of the contract is not affected by the death of one of the parties or by his becoming

physically or mentally incapable of contracting before the acceptance becomes effective unless the contrary results from the intention of the parties, usage or the nature of the transaction."

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 11.

Commentary

1. Article 11 provides that the normal rule to be applied is that an offer can be accepted and a contract can be concluded even though the offeror or the offeree has died or has become physically or mentally incapable of contracting before the acceptance became effective. In such a case the contract is concluded with the legal representative or successor of the person who died or became incapable of contracting. This rule reverses the rule in some legal systems that an offer can be accepted only if both the offeror and offeree are personally able to conclude the contract at the moment the acceptance would become effective.

2. It would appear that article 11 does not affect the rule that the offeror must have been capable of contracting at the time the offer was made. It is less clear whether the offeree must have been capable of contracting at that time.

3. The last clause of article 11 makes it clear that the offer cannot be accepted if the parties intended that the contract could be concluded only between themselves and not between one of them and a legal representative or successor of the other or if this would result from usage or from the nature of the transaction.

4. Article 11 does not relate to all the events which might occur between the making of an offer and its acceptance which would prevent the acceptance from being effective. In particular, it gives no rule for the eventuality that one or the other of the two parties would become bankrupt or that, if it was a legal person, it would cease to exist. The rules on bankruptcy are so complex and differ so widely between legal systems that it was thought not to be desirable at this time to attempt a unification of the law in respect of this one issue. Similarly, the termination of existence of a legal person for reasons other than bankruptcy is often associated with a reorganization of the corporate structure of that party. The extent to which a successor corporation should be bound by offers made by its predecessor or the extent to which it should be able to accept offers made to its predecessor was a matter thought to be better handled by direct negotiation between the two parties and, failing agreement, by the applicable national law.

"Article 12

"For the purposes of this Convention an offer, declaration of acceptance or any other indication of intention is 'communicated' to the addressee when it is made orally or delivered by any other means to him, his place of business, mailing address or habitual residence."

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 12.

⁸ Articles 8 (1 *bis*) and 8 (1 *ter*) state when an acceptance becomes effective.

Commentary

1. Article 12 provides that any indication of intention is "communicated" when it is delivered, not when it is dispatched. Until the delivery has occurred, the indication of intention has no legal effect.

2. One consequence of this rule is that an irrevocable offer or an acceptance may be withdrawn until it is delivered. Furthermore, an offeree who learns of an offer from a third person prior to its delivery may not accept the offer until it has been delivered.

3. An offer, an acceptance or other indication of intention is "communicated" to the addressee when, among other possibilities, it is delivered to "his place of business, mailing address or habitual residence". In such a case it will have legal effect even though some time may pass before the addressee, if the addressee is an individual, or the person responsible, if the addressee is an organization, knows of it.

Article 13

"Usage means any practice or method of dealing of which the parties knew or had reason to know and which in international trade is widely known to and regularly observed by parties to contracts of the type involved in the particular trade concerned."

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 13.

Draft CISG, article 7.

Commentary

1. Article 13 is modeled on article 7 of the draft CISG. However, it differs from the draft CISG in several respects.

2. Article 7 of the draft CISG is a substantive provision which states that any "usage of which the parties knew or ought to have known" and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned" is made applicable to the contract. In this Convention, however, a "usage" is made applicable to the transaction by virtue of articles 2 (2), 11 and 14 (4). The function of article 13 is to define what constitutes a "usage" within the context of this Convention.

2. ANALYSIS OF UNRESOLVED MATTERS IN RESPECT OF THE FORMATION AND VALIDITY OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS*

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* The Commission at its tenth session replaced the words "had reason to know" by the words "ought to have known".

* Originally issued as A/CN.9/WG.2/WP.28 on 24 August 1977.

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INTRODUCTION

1. At its eighth session the Working Group on the International Sale of Goods requested the Secretariat to prepare a commentary on the text of the draft Convention on the Formation of Contracts for the International Sale of Goods as approved by the Working Group at that session.¹ A draft commentary on the first 13 articles appears in document A/CN.9/WG.2/WP.27.* A draft commentary on article 14 is set out in part I of this report.

2. The Working Group also requested the Secretariat to analyse the UNIDROIT text of a draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods "and to suggest, with draft texts as necessary, what matters covered by that text as well as what other matters of validity of contract should be included in the draft Convention".¹ This analysis is contained in part II of this report.

3. In addition, during the course of the session it was suggested that the Secretariat might consider whether there were any additional subjects which might profitably be added to the present draft Convention on the Formation of Contracts for the International Sale of Goods. Some suggestions along these lines are contained in part III of this report. Suggestions on these matters which were communicated to the Secretariat by the German Democratic Republic are contained in the annex to document A/CN.9/WG.2/WP.30.**

4. The Working Group also requested the Secretariat to suggest a reorganization of the provisions in a more logical order and to prepare titles for the individual articles.¹ This suggested reorganization is contained in part IV of the report.

I. DRAFT COMMENTARY ON ARTICLE 14 OF THE DRAFT CONVENTION ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AS APPROVED OR DEFERRED FOR FURTHER CONSIDERATION BY THE WORKING GROUP ON THE INTERNATIONAL SALE OF GOODS AT ITS EIGHTH SESSION

"Article 14

"(1) [Communications, statements and declarations by and acts of] the parties are to be interpreted according to their actual common intent where such an intent can be established.

"(2) If the actual common intent of the parties cannot be established, [communications, statements and declarations by and acts of] the parties are to be

* Reproduced in this volume, part two, I, B, I above.

** Idem, part two, I, B, 4 below.

¹ Report of the Working Group on the International Sale of Goods on the work of its eighth session, A/CN.9/128, para. 174 (Yearbook ... 1977, part two, I, A).

interpreted according to the intent of one of the parties, where such an intent can be established and the other party knew or ought to have known what that intent was.

"(3) If neither of the preceding paragraphs is applicable, [communications, statements and declarations by and acts of the parties] are to be interpreted according to the intent that reasonable persons would have had in the same circumstances.

"(4) The intent of the parties or the intent a reasonable person would have had in the same circumstances or the duration of any time-limit or the application of article 11 [may] [is to] be determined in the light of the circumstances of the case including the [preliminary] negotiations, any practices which the parties have established between themselves, any conduct of the parties subsequent to the conclusion of the contract, usages [of which the parties knew or had reason to know and which in international trade are widely known to, and regularly observed by parties to contracts of the type involved in the particular trade concerned]."

PRIOR UNIFORM LAW

Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), articles 4(2), 5(3).

UNIDROIT Draft of a Uniform Law for the Unification of Certain Rules relating to Validity of Contracts for the International Sale of Goods (draft Law on Validity), articles 3, 4 and 5.

Commentary

5. At its eighth session the Working Group on the International Sale of Goods decided to delete the two provisions on interpretation found in ULF and requested the Secretariat to prepare a draft text on interpretation based on articles 4(2) and 5(3) of ULF and articles 3, 4 and 5 of the draft Law on Validity.²

6. The Working Group, after considering a draft proposed by the Secretariat, agreed that a provision on interpretation was important and should be included in the draft text. However, in view of the lack of time to discuss fully all the important issues raised by this text, and because other important matters of interpretation had not been included in it, the Working Group decided to place the provision in square brackets and requested the Secretariat to prepare a commentary on this article that included practical examples.³

7. This commentary on article 14 has been written in response to that request. Because of the tentative nature of the current text of article 14, this commentary is not limited to the issues raised by that text.

8. In this discussion two general questions are raised:

Whether the text should be limited to the interpretation of the statements and acts of the parties in order to determine whether a contract has been concluded or whether the text should also apply to interpretation of the contract.

What rules of interpretation should be included in the text.

These two questions are interrelated. However, some preliminary remarks in respect of the scope of application of the rules of interpretation should first be made.

Scope of application

9. The text of article 14 standing by itself would seem to provide that the rules of interpretation contained therein apply to the various communications, statements, and declarations by and acts of the parties for the purpose of determining the content of the contract once concluded as well as for the purpose of determining whether those communications, statements, declarations and acts were sufficient to constitute a contract. However, article 1 of the present draft Convention in both its alternatives provides that "This Convention [including article 14] applies to the formation of contracts . . .". Therefore, unless an exception was made to the general rules on the scope of application of this draft Convention, it would appear that article 14 would by necessity be limited to the determination of whether a contract was concluded.

10. This restricted function of article 14 as currently drafted is consistent with the functions of articles 4(2) and 5(3) of ULF, which gave rules of interpretation for determining whether a particular communication constituted an offer and whether or not the offer was irrevocable. Article 14 is, however, more restricted in its functions than were articles 3, 4 and 5 of the draft Law on Validity.

11. Articles 3, 4 and 5 of the draft Law on Validity were intended "to describe . . . the steps (and thereby to exclude others) that must be taken in order to ascertain the existence of a contract and its precise content".⁴ If the application of the rules of interpretation in articles 3 and 4 showed that no agreement between the parties could be established, "there is no contract".⁵ However, if by application of those rules of interpretation a contract was found to exist, the same rules of interpretation were to be applied to determine its content.

12. Some of the difficulties in restricting the application of article 14 as it is currently drafted to the question as to whether a contract has been concluded arise out of the fact that its substantive rules of interpretation are taken directly from articles 3 and 4 of the draft Law on Validity. The Working Group may wish, therefore, to consider whether it should either replace article 14 with provisions similar to articles 4(2) and 5(3) of ULF which would be limited to certain narrow questions relating to the formation of the contract or expand the scope of application of the rules on interpretation so that they would apply to the interpretation of the contract.

Content of the rules in article 14

13. The rules of interpretation currently in article 14

⁴ Explanatory report of the Max-Planck Institut für Ausländisches und Internationales Privatrecht (hereafter referred to as the Max-Planck report) (UNIDROIT document: ETUDE XVI/B, Doc. 22 (English and French only), p. 23). All page references given in the foot-notes pertain to the English language version of the report.

⁵ Article 5.

² *Ibid.*, para. 155.

³ *Ibid.*, paras. 156 and 158.

give primacy to the subjective actual common intent of the parties. If such an actual common intent cannot be determined, the subjective intent of one of the parties is to be followed if the other party knew or ought to have known what that intent was. Upon the failure of either of these two tests to produce a result, an objective standard of interpretation is to be applied, "the intent that reasonable persons would have had in the same circumstances".

14. A fourth possible rule, one which is not found in article 14, would be that the words and actions of the parties are to be interpreted as would a reasonable third person not in the same situation as the parties. Such a test is sometimes referred to as the "plain meaning rule". The principal difference between such a rule and the rule in article 14(3) is that the reasonable persons in 14(3) are to be treated as being "in the same circumstances" as the parties. In the context of a commercial sale, it would appear that the "reasonable persons" would be merchants who dealt in the trade concerned rather than intelligent non-merchants. Furthermore, according to article 14(4), they are reasonable persons who are aware of all the negotiations of this transaction, any practices these parties have established between themselves, any conduct of these parties subsequent to the conclusion of the contract and usages relevant in the trade.

15. Therefore, if it was an industry practice that a provision in the contract that the goods were to be "50 per cent pure" was met by goods that were 49.5 per cent pure, this industry practice would be used in the interpretation of the contract under article 14(3), as being indicative of the intent that reasonable persons in the same circumstances as the parties would have had. However, this industry practice would not be used under the "plain meaning" rule because it would not accord with the understanding that intelligent individuals who were not engaged in this particular trade would give to these words.

16. It would also seem to be the case that as a result of the rule in article 14(3) the substance of article 9(3) of the Uniform Law on the International Sale of Goods (ULIS) would be introduced into this Convention as a supplementary rule of interpretation. Article 9(3) of ULIS reads:

"3. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned."

17. Where the contract is commercial, reasonable persons in the same circumstances as the parties, i.e. in the trade concerned, would have the intent to use the meaning usually given in that trade to an expression, provision or form of contract commonly used in that trade. However, in contrast to article 9(3) of ULIS, article 14(3) is clearly subordinate to rules of interpretation which put the primary emphasis on the subjective intent of the parties.⁶

⁶ Article 9(3) was deleted from the revision of ULIS by the Working Group at its sixth session (A/CN.9/100, para. 38; Yearbook . . . 1975, part two, I, 1). A proposal to reintroduce that provision, or one similar in content, was rejected by a narrow margin at the tenth session of the Commission (Report of the United Nations Commission on International Trade Law on the work of its tenth session, *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17* (A/32/17), para. 86; Yearbook . . . 1977, part one, II, A).

18. To a certain degree the fact that the "reasonable person" rule of article 14(3) is phrased in terms of reasonable persons in the same situation as the parties, makes the order in which the three rules are to be applied of minor importance. What is important is that the "plain meaning" rule is not to be applied. This point is well illustrated by the example used in the Max-Planck report accompanying the draft Law of Validity.

"[T]he seller may agree with the buyer to indicate a purchase price of 50,000 in his invoice in order to reduce the broker's fees, although they are agreed that the true price is to be 100,000. The true contract of the parties (which may or may not be void for other reasons) is for 100,000, while the feigned contract is for 50,000. The latter contract is void, according to the common intent of the parties. In these cases of 'simulated contracts' the common intent of the parties is to prevail."

19. As stated in the Max-Planck report, the actual common intent of the parties, which is made the governing intent by article 14(1) (article 3(1) of the draft Law on Validity), was that there should be a contract and that the contract should be for 100,000. The same result is achieved under article 14(3) because reasonable persons in the same situation as the parties would have intended the contract to be for 100,000. In fact, it is difficult to imagine a situation in which reasonable persons in the same situation as the parties with full knowledge of the transaction would have had an intent different from the actual common intent of the parties, if such an intent existed. On the other hand, application of the "plain meaning" rule would lead to the conclusion that a contract existed and that that contract was for 50,000.

20. Normally, the function of rules of interpretation such as those in article 14 is to determine the meaning of a contract. There are, however, several situations in which their function is to aid in the determination as to whether a contract exists. The most obvious case is that in which the purported words of contract, such as an exchange of telegrams in which the first one reads "Will send 100" and the reply says simply "Agreed", do not by themselves state a contract. Usually such a cryptic exchange of messages can be given a clear meaning from the prior negotiations or prior conduct of the parties and would be held to be a contract to sell specific goods at a specific price. If the application of the rules in article 14 does not give adequate meaning to the exchange of telegrams, no contract would exist.

21. A second example in which the rules of interpretation must be used to determine whether a contract exists arises when the words used by the parties appear to express agreement but there is a latent ambiguity in the words which were used. This situation is illustrated by the famous English case of *Raffles v. Wichelhaus*.⁷

22. In that case the parties agreed upon the sale of cotton to arrive "ex Peerless" from Bombay without either party realizing that there were two ships named *Peerless* leaving Bombay several months apart. The buyer had in mind the ship that sailed in October, and the seller had in mind the ship that sailed in December.

23. Accordingly, there was no manner by which the

⁷ Max-Planck report, p. 23.

⁸ (1864) 2 H and C 906 (Hurlstone and Colman's Reports—Exchequer).

contract could be interpreted to arrive at the intent of the parties. They had no common intent. Neither party knew or had any reason to know of the other party's intent. A reasonable person in the same circumstances would have fared no better than the parties and there was no plain meaning of the words to help determine which of the two ships was intended. In this situation the only question left was whether the identity of the ships on which the cotton was to be shipped was an essential point on which they had to agree in order to conclude a contract, a question answered in the affirmative by the court.

24. A third situation in which the rules of interpretation might be applied to determine whether a contract existed would be where the parties exchanged words which were, standing by themselves, sufficient to constitute a contract although the parties did not as yet intend to conclude a contract. For example, the parties might agree that 100 units would be sold by the seller to the buyer at 20 per unit. Such an agreement would be sufficient to constitute a contract. However, if it could be shown from prior conduct that the parties never considered a contract to have been concluded until they subsequently agreed on the time and place of delivery, the application of the rules of interpretation in article 14 would lead to the conclusion that there was as yet no contract.

25. A different result would appear to follow from a strict application of the "plain meaning" rule of interpretation since the words used would be sufficient to constitute a contract. Unless some exception to the rule was adopted, it would not be possible to show, under article 4(1) of the draft Convention, that the purported offer does not indicate "the intention of the offeror to be bound in case of acceptance".

Examples illustrating the application of the rule of interpretation

26. At its eighth session the Working Group requested the Secretariat to prepare practical examples that would illustrate the practical effect of the rules of interpretation in article 14. The following examples have been prepared in accordance with that request.

27. *Example 1.* A seller from the United States agreed to sell to a buyer from Egypt 1,000 "tons" of ore. This was the first contract between the two parties. The seller meant a ton as understood in the United States, i.e. 2,000 lbs. (or 907.2 kilograms). The buyer meant a ton as understood in Egypt, i.e. 1,000 kilograms (or 2,204.6 lbs.). Neither party knew nor had any reason to know the other party's intention.

28. In this case neither article 14(1) nor article 14(2) can be applied since there was no actual common intent and neither party knew nor ought to have known of the other party's intention. Therefore, it is necessary to determine what intent "reasonable persons would have had in the same circumstances" in the light of the circumstances of the case.

29. In making this determination the most significant matters could be expected to be the practices in the trade and the price. These factors may also be relevant in applying the test in article 14(2), i.e. one of the parties "knew or ought to have known" what the other party intended.

30. It is unlikely that a tribunal would rule that it

could not determine whether reasonable persons in the circumstances would have intended a ton of 2,000 lbs. or a ton of 1,000 kilograms. However, even if it so ruled, it would have to conclude that there was no contract since the quantity of goods to be delivered is an essential part of the contract and there are no rules in CISG to determine the quantity if the parties have not reached agreement on the point (unless the case came within article 4(2) of the present text).

31. *Example 2.* The same facts as in example 1 except that it was an industry practice to sell the ore by units of metric tons. However, the seller was new to the trade and did not know of this industry practice.

32. In such a case, even though this seller could show that he did not know of the industry practice to sell ore by units of metric tons, he ought to have known of that practice. Since the buyer intended a metric ton and the seller ought to have known that the buyer intended a metric ton, the application of the rule in article 14(2) results in a contract for 1,000 metric tons of ore.

33. Alternatively, a tribunal might apply article 14(3). Thus, reasonable persons in the same circumstances would have intended a "ton" to mean a metric ton. Use of the "plain meaning" rule would lead to difficulties, since the word "ton" has more than one meaning (and particularly in an international context), unless the plain meaning was to be determined according to the specific meaning used in the trade.

34. *Example 3.* The facts are the same as in example 1 except that, while the seller meant a ton of 2,000 lbs., he knew that it was the industry practice to sell in units of metric tons. The buyer, on the other hand, did not know of the industry practice of selling in units of metric tons but, coming from a country which used the metric system, he assumed that the word ton meant a metric ton.

35. There was no actual common intent of the parties in this case. However, the buyer intended that the contract be for 1,000 metric tons. The seller ought to have known that the buyer intended the contract to be for 1,000 metric tons but the reason he ought to have known this was not the reason the buyer had such an intention. Nevertheless, a tribunal would probably hold on the basis of article 14(2) that there was a contract and that it was for 1,000 metric tons.

36. As in example 2, the tribunal might apply article 14(3), to the effect that reasonable persons in the same circumstances would have intended a "ton" to mean a metric ton.

37. *Example 4.* The buyer's printed purchase order form contained a clause providing for arbitration of any dispute arising out of the contract. The seller's printed confirmation form contained a clause providing that the commercial court where the seller had his place of business had exclusive jurisdiction over any dispute arising out of the contract. Neither party objected to the provision in the other party's form.

38. This case will not be settled according to the rules of interpretation in article 14 but by application of the provisions of article 7 of the draft Convention. If it is determined that the provision in the seller's confirmation form conferring jurisdiction of any dispute arising out of the contract on the commercial court at his place of business is a material alteration of the terms of the

offer, no contract would arise out of the exchange of purchase order and confirmation form. If it is determined not to be a material alteration, a contract is concluded which includes the term in the seller's form.

39. *Example 5.* There was an agreement for the sale of goods "FOB". As a consequence of this trade term the risk of loss would normally pass when the goods were handed over to the ocean carrier.⁹ However, the negotiations between the parties show that the price was adjusted to compensate for the fact that the seller's blanket insurance policy was to cover the goods during shipment.

40. Notwithstanding the normal meaning of an FOB term, it may be found that the actual common intent of the parties was that the seller should bear the risk during transit.

II. VALIDITY OF CONTRACTS

41. In the report of the Secretary-General prepared for the eighth session of the Working Group it was "suggested that the draft Convention to be prepared not include any provisions in respect of validity of contracts based on the [draft Law on Validity]".¹⁰ This conclusion was reached after an analysis of the practical need for a text on the validity of contracts of international sale of goods and of the text of the draft Law on Validity itself.

42. At its eighth session the Working Group decided to prepare a new provision on interpretation based upon articles 3, 4 and 5 of the draft Law on Validity as well as on articles 4(2) and 5(3) of ULF. As to the rest of the draft Law on Validity, the Working Group requested the Secretariat to analyse the remainder of the text in the light of the discussions which had taken place and to suggest, with draft texts as necessary, what matters covered by that text as well as what other matters of validity of contracts should be included in the draft Convention.¹¹

43. In addition, the Working Group invited any representatives or observers to submit their views to the Secretariat on the matter.¹² Observations were submitted by the representative of the United Kingdom¹³ and a suggestion in respect of the validity of contracts was received from the German Democratic Republic.¹⁴

Analysis of the draft Law on Validity

44. The Secretariat has reviewed the text of the draft Law on Validity in the light of the discussions at the eighth session of the Working Group and of the observations of the German Democratic Republic and of the representative of the United Kingdom. On the

basis of this review the Secretariat would suggest that of the articles of the draft Law, other than those concerned with interpretation, the Working Group consider for inclusion in the draft Convention only articles 9 and 16.

45. Of the articles not recommended for inclusion, the most important is article 6 which states the main policy choices of UNIDROIT in respect of the law of mistake. In the report of the Secretary-General issued in preparation for the eighth session of the Working Group it was stated that it was doubtful if the text would lead to a uniform body of interpretation.¹⁵ It is believed that that conclusion was accurate. Furthermore, it does not seem that the problems lie in any particular deficiencies in the text as prepared by UNIDROIT which could be rectified by a new and different text.¹⁶

46. A decision not to include article 6 of the draft Law in the draft Convention implies that articles 7, 8, 10 and 15, all of which depend on the existence of a definition of mistake in article 6, will not be included. It is suggested that article 11 is not suitable for the reasons given in the previous report of the Secretary-General¹⁷ and in the observations of the representative of the United Kingdom.¹⁸ Articles 12, 13 and 14 deal with the mechanics of the avoidance of the contract under articles 6, 10 or 11 and are not necessary if those articles have not been included in the draft Convention.

47. However, even though articles 9 and 16 assume the existence of the provisions on mistake, they do not depend on the existence of those articles and the Working Group may wish to consider their inclusion in the draft Convention. In each case the article specifies which of several possible remedies may be available to a party who has not received that which he expected in the transaction.

Limitation on rights to avoidance for mistake

48. Article 9 of the draft Law on Validity provides:

"The buyer shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford him a remedy based on the non-conformity of the goods with the contract or on the existence of rights of third parties in the goods."

49. If the goods which are the subject-matter of the contract do not conform to the contract and this non-conformity existed at the time of the conclusion of the contract, it would be possible to hold that the seller has breached the contract in respect of the conformity of the goods. Accordingly, the buyer would have the rights under the substantive law of sale of goods which follow upon such a breach. It would also be possible to hold that the buyer was mistaken as to the quality of the goods at the time of contracting and that his rights were those which follow upon such a mistake.

50. Article 9 provides that where the substantive law of sales affords the buyer a remedy based on the non-conformity of the goods with the contract or on the existence of rights of third parties in the goods, the

⁹ Draft Convention on the International Sale of Goods, article 65(1), Report of the United Nations Commission on International Trade Law on the work of its tenth session, *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17*, (A/32/17), para. 35 (Yearbook . . . 1977, part one, II, A). According to Incoterms, in an FOB contract the risk passes when the goods pass the ship's rail.

¹⁰ A/CN.9/128, annex II, para. 27 (Yearbook . . . 1977, part two, I, C).

¹¹ A/CN.9/128, para. 174 (Yearbook . . . 1977, part two, I, A).

¹² See document A/CN.9/WG.2/WP.29, annex (reproduced in the present volume, part two, I, B, 3 below).

¹³ See document A/CN.9/WG.2/WP.30, annex, para. 3 (reproduced in the present volume, part two, I, B, 4 below).

¹⁴ A/CN.9/128, annex II, commentary on article 6.

¹⁵ See also the detailed observations of the representative of the United Kingdom (A/CN.9/WG.2/WP.29, annex, paras. 3-13).

¹⁶ A/CN.9/128, annex II, commentary on article 11.

¹⁷ A/CN.9/WG.2/WP.30, annex, para. 15.

buyer may not avoid the contract on the ground of mistake.

51. This provision was originally seen as supplementing articles 34 and 53 of ULIS, which limited the buyer to the rights provided by ULIS and excluded all other remedies where there was a lack of conformity of the goods or where the goods were subject to a right or claim of a third person.¹⁸ Even though these provisions have been deleted from the draft Convention on the International Sale of Goods, the Working Group may wish to conclude that it would be appropriate in a draft Convention on the formation and validity of contracts of international sale of goods to include a provision similar to article 9, whether or not the draft Convention includes substantive provisions on the law of mistake.

52. The current text of article 9 would seem to say that the right to avoid the contract on the ground of mistake is precluded only if there is in fact a remedy available to the buyer. However, the Max-Planck report which accompanies the text of the draft Law states that "article 9 is meant to cover also those cases in which the buyer might have relied on a remedy under ULIS if, in the circumstances, those remedies had not been barred (for example, because the lack of conformity is immaterial or the buyer has not given prompt notice, . . .)".¹⁹

53. In order to achieve the result suggested by the Max-Planck report, a result which would seem to be appropriate,²⁰ it may be sufficient to delete the words "if the circumstances on which he relies afford him a remedy". This would leave to the substantive law of sales all cases in which the buyer alleged that the seller had breached the contract because the goods did not conform to the contract or that third parties had rights in the goods. If the Working Group were to adopt this approach, the text would read as follows:

"The buyer may not avoid the contract on the ground of mistake based on the non-conformity of the goods with the contract or on the existence of rights of third parties in the goods."

54. Article 16 of the draft Law on Validity provides:

"1. The fact that the performance of the assumed obligation was impossible at the time of the conclusion of the contract shall not affect the validity of the contract, nor shall it permit its avoidance for mistake.

"2. The same rule shall apply in the case of a sale of goods that do not belong to the seller."

55. Article 16 is similar to article 9 in that it specifies that in two particular cases the party who alleges that the other party failed to perform the contract must rely on the substantive law of sales rather than avoid the contract for mistake. These two situations are:

The performance of the assumed obligation was impossible at the time of the conclusion of the contract, and

The goods sold did not belong to the seller.

56. The Max-Planck report points out that, "fol-

lowing judicial practice and advanced modern doctrines"

"[T]here appears to be no reason to make the validity of the contract depend upon the accidental fact that the object sold has perished before or after the conclusion of the contract. The impossibility of delivery of the perished goods should leave the door open, to determine the rights and obligations of the parties according to the flexible rules on non-performance."²¹

57. In the critical analysis of the draft Law prepared by the Secretary-General²² it was suggested that the difficulty with article 16 was that it assumed that the doctrines of non-performance in the applicable substantive law of sales would apply to an impossibility of performance existing at the time of the conclusion of the contract. However, it was noted that according to the Max-Planck report "most legal systems declare a contract of sale to be void if the specific object sold had already perished at the time of the conclusion of the contract". Similarly, it was noted that article 50 of the draft CISG as the text then existed proceeded on the basis that the impediment to performance which exempts the non-performing party from liability in damages for his non-performance must have occurred after the conclusion of the contract.

58. The Working Group may wish to consider whether this conclusion remains valid. During the tenth session of the Commission article 50 of CISG (now article 51) was changed in a manner which no longer supports the prior conclusion that that text would not apply to an impossibility of performance which occurred prior to the conclusion of the contract.²³ Furthermore, the Working Group might conclude that a legal system which adopted this Convention, including a provision such as that in article 16, would adapt to its requirements by providing that the law in respect of impossibility of performance applied to those events which occurred prior to the conclusion of the contract as well as to those events which occurred after the conclusion of the contract.

59. The Max-Planck report explains the purpose of paragraph 2 of article 16 as follows:

"Paragraph 2 excludes the rule of certain countries that deem a contract of sale void if the seller did not own the sold object. While art. 9 of the draft excludes avoidance of the contract, in such a case, on the ground of mistake, a special provision is necessary to save the contract from nullity *per se*. The rights and duties of the parties are to be determined by the rules of the applicable law relating to a valid contract of sale, especially those on performance and non-performance."²⁴

²¹ P. 49.

²² A/CN.9/128, annex II, commentary on article 16.

²³ The text was changed in relevant part from "if he proves that it was due to an impediment which occurred without fault on his part" to "if he proves that the failure was due to an impediment beyond his control". Under the original wording the provision was open to the interpretation that the impediment must have occurred after the conclusion of the contract since the Convention generally concerned itself with the relationship of the buyer and seller after the contract of sale was concluded. The revised text removes this interpretation by concentrating on the failure to perform.

²⁴ P. 51.

¹⁸ Max-Planck report, p. 37.

¹⁹ Pp. 31 and 39.

²⁰ This view is also expressed in the observations of the representative of the United Kingdom (A/CN.9/WG.2/WP.29, annex, para. 16, foot-note f).

Other proposals in respect of validity

60. During the eighth session of the Working Group the representative of Hungary submitted the following proposal,²⁵ the consideration of which was deferred by the Working Group to its ninth session:

"I

"In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith. [Conduct violating these principles is devoid of any legal protection]."

"II

"The exclusion of liability for damage caused intentionally or with gross negligence is void."

61. The German Democratic Republic has suggested that the following paragraph be added to the proposal of the representative of Hungary:

"In case a party violates the duties of care customary in the preparation and formation of a contract of sale, the other party may claim compensation for the costs borne by it."²⁶

III. ADDITIONAL SUBJECTS WHICH MIGHT BE INCLUDED IN THE DRAFT CONVENTION ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

62. During the eighth session of the Working Group it was suggested that the Secretariat consider whether there were any additional subjects within the general scope of the draft Convention which might profitably be added to the current text. One such subject is suggested. In addition, the German Democratic Republic has communicated a number of suggestions which are contained in the annex to document A/CN.9/WG.2/WP.30.

Termination of an offer by rejection

63. Article 7(1) provides that "A reply to an offer containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." Although not explicitly stated, the provision seems to assume that an offer can no longer be accepted by the offeree once it has been rejected by him.

64. Such a rule appears to exist in most, if not all, countries in respect of a revocable offer.

65. However, it appears that there are different rules in various countries as to whether the rejection of an irrevocable offer terminates the power of an offeree to accept the offer after such a rejection but prior to the date on which the offer would otherwise lapse. In many of the civil law systems an offer, even though irrevocable, is terminated by a rejection, although the time during which the offer could have been accepted has not yet expired. In most of the common law systems, on the other hand, an irrevocable offer is probably not terminated by rejection. However, if the offeror has materially changed his position in reliance upon such a rejection, the offeree may be precluded from subsequently accepting.²⁷

²⁵ A/CN.9/WG.2/VIII/CRP.8

²⁶ A/CN.9/WG.2/WP.30, annex, para. 3.

²⁷ The discussion in this section relies upon Rudolf B. Schlesinger ed., *Formation of Contracts: A Study of the Common Core of Leg*

66. The practical effect of these rules is not only determined by the formal rule itself but by the willingness of a tribunal to find that the offeree's reply to the offer was or was not a rejection of the offer. The problem arises most acutely when an offeree who is not willing simply to accept an offer as made inquires about possible changes in the terms or proposes different terms. In either case a tribunal might find that the reply constituted a rejection of the offer, as in article 7(1), or it might find that it was an independent communication which did not constitute a rejection of the offer.

67. It would probably not be possible to draft a rule more explicit than that already in article 7(1) to the effect that "A reply to an offer containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." However, the Working Group may believe that it would be useful to have a rule as to whether, after the rejection of an offer, the offer can still be accepted by the offeree.

68. If the Working Group does wish to adopt such a rule, it would have a choice between several major possibilities, e.g.:

Rejection of an offer, whether revocable or irrevocable, terminates the offeree's power to accept the offer.

Explicit or implicit rejection of an offer terminates the offeree's power to accept unless the offer was irrevocable and the offeree paid the offeror to make the offer irrevocable or the offer was part of a larger transaction such as a concession agreement.

Rejection of an offer, whether revocable or irrevocable, terminates the offeree's power to accept the offer except that a rejection which arises out of the making of a counter-offer does not terminate the offeree's power to accept an irrevocable offer.

Rejection of an irrevocable offer does not terminate the offeree's power to accept the offer, unless there is a change in position by the offeror in reliance on the rejection.

Rejection of an irrevocable offer does not terminate the offeree's power to accept the offer.

69. There is nothing in the doctrinal structure of articles 1 to 13 of the draft Convention which leads to a clear choice among these alternatives. It could as easily be said that the power to accept has been terminated because a party can always act unilaterally to waive his unilateral rights as it could be said that the power to accept cannot be terminated unilaterally by the offeree because the irrevocable offer is—or is of the nature of—a contract which can be terminated only by mutual agreement.

70. It is also difficult to choose between the alternatives on the basis of policy. On the one hand the fact that the offer was made irrevocable by the offeror suggests that there were good reasons for doing so at the time and that those reasons may still exist. Certainly an offeree should not lightly lose the benefits of irrevocability because he wished to negotiate for better terms. On the other hand the offeror should be free to contract with someone else—or to reorder his affairs so that he has no need to contract with anyone—once he has a

Systems (Oceana Publications, Dobbs Ferry, N.Y., 1968) sect. B-3, which contains an analysis of the law of a number of countries throughout the world.

clear indication that the offeree does not wish to contract on the basis of the offer.

71. It may be that a reasonable rule in this situation would be the third alternative suggested above, i.e. a rejection of an offer, whether revocable or irrevocable, terminates the offeree's power to accept the offer except that a rejection which arises out of the making of a counter-offer does not terminate the offeree's power to accept an irrevocable offer. If the Working Group were to adopt such a rule, it may wish to consider whether any modification of article 7(1) of the draft Convention would be desirable.

IV. REORGANIZATION OF PROVISIONS OF THE DRAFT CONVENTION

72. The Working Group on the International Sale of Goods at its eighth session requested the Secretariat to suggest a reorganization of the provisions of the draft Convention on the Formation of Contracts for the International Sale of Goods and to prepare titles for each article.²⁸ This suggested reorganization has been prepared in response to that request.

Proposed numbering	Current numbering	Proposed titles of each provision
(Chapter I.		
Sphere of application)		
1	1	Scope
2	2	Autonomy of parties
(Chapter II.		
General provisions)		
3	3	Form
4	14	Interpretation
5	13	Usage
6	12	Communication
7	11	Death or incapacity of a party
(Chapter III.		
Formation of the contract		
8	4	Offer
9	5(1)	Time of effect of offer
10	5(2) + 5(3)	Revocability of offer
11	8(1), 8(1 bis)	8(1 <i>ter</i>) Acceptance
12	7	Additions or modifications to the offer
13	8(2), 8(3)	Times fixed for acceptance
14	9	Late acceptance
15	10	Revocation of acceptance
16	6	Time of conclusion of contract
17	3A	Modification and rescission of contract

3. OBSERVATIONS OF REPRESENTATIVES ON THE DRAFT OF A UNIFORM LAW FOR THE UNIFICATION OF CERTAIN RULES RELATING TO VALIDITY OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS*

Introduction

1. The Working Group on the International Sale of Goods, at its eighth session (New York, 4-14 January 1977), invited representatives of Member States and the observers who attended that session to submit to the

Secretariat their observations on the text of the draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods which has been prepared by the International Institute for the Unification of Private Law (UNIDROIT).¹

2. At the time of issuing this note, observations had been received from the representative of the United Kingdom of Great Britain and Northern Ireland. The text of these observations is set out in the annex to this note.

ANNEX

Observations of the representative of the United Kingdom of Great Britain and Northern Ireland on the UNIDROIT draft on validity

1. These observations will be largely confined to articles 6, 10 and 11 of the draft because these are the key articles upon the acceptability of which everything else depends. For the difficulties which are presented by the other articles, reference may be made to the Secretariat's commentary (A/CN.9/WG.2/WP.26/Add.1).*

Article 6

2. This article lays down three sets of conditions which must be fulfilled at the time of the conclusion of the contract in order to enable a party to avoid a contract for mistake. Each set of conditions presents particular difficulties and therefore requires individual consideration.

Article 6 (a)

(a) The mistake is, in accordance with the above principles of interpretation, of such importance that the contract would not have been concluded on the same terms if the truth had been known;

3. There are two difficulties in this clause. The first lies in determining the meaning to be given to the phrase "in accordance with the above principles of interpretation", and the second in reconciling the apparent meaning of the phrase "such importance that the contract would not have been concluded on the same terms . . ." with the meaning which the Max-Planck report shows that it was intended to bear.

4. In giving a meaning to the phrase "in accordance with the above principles of interpretation" (i.e. those in article 3 and article 4) one must distinguish between the mistake and the object of the mistake. The mistake is the mistake of one party, though it may (but need not) be shared by the other party; see article 6 (c) ("the other party has made the same mistake") and article 7 (2). The "above principles" can therefore play no part in determining whether there has been a mistake, because those principles are concerned only with the interpretation of a common intent. On the other hand they do play a part in relation to the object of the mistake. This object must have been "of such importance that the contract would not have been concluded on the same terms if the truth had been known", and in order to determine whether the contract would have been so concluded it is not sufficient to look simply to the probable attitude of the mistaken party, i.e. one must not ask whether he himself would have accepted (or offered) the same terms (in this respect the Secretariat's commentary is, according to the interpretation of the Max-Planck report, in error). One must look, in the first place, to the actual common intent of both parties (article 3 (1)). But this, as the Max-Planck report accepts, will rarely have existed, i.e. it is very unlikely that the parties will have asked themselves at the time of the conclusion of the contract which elements were of the necessary importance; and if they did ask themselves the question, it is very unlikely that they arrived at an agreed answer. (Indeed, if they did agree on the

²⁸ A/CN.9/128, para. 174.

* Originally issued as A/CN.9/WG.2/WP.29 on 12 August 1977.

¹ See report of the Working Group on the International Sale of Goods on the work of its eighth session, A/CN.9/128, para. 174 (Yearbook . . . 1977, part two, 1, A).

* Yearbook . . . 1977, part two, 1, C, appendix II.

answer, the question of mistake will presumably not arise, since the situation will be governed by that agreement). If there is no such common intent, one must look (article 3 (2)) to what the mistaken party thought, but only if the other party knew or ought to have known what that was. But, as the Max-Planck report once again accepts, this condition is very unlikely to be satisfied, and one is left with article 3 (3): "the statements by and the acts of the parties shall be interpreted according to the intent that reasonable persons would have had in the same situation as the parties".

5. The meaning of article 6 (a) is therefore that the mistaken party's mistake must be of such importance that reasonable persons in the same situation as the parties would not have concluded the contract on the same terms if they had known the truth. And it is here that the central difficulty of the clause lies. On the one hand the test thus formulated is very artificial: it presupposes that for any given set of circumstances there is an objectively ascertainable set of terms on which reasonable men would agree. And on the other hand the formulation is much too wide, as the Secretariat's commentary makes clear. Almost any difference between the circumstances as they were thought to be and the circumstances as they in fact were might have led reasonable men to make some modification, even if only a small one, of the terms on which the contract was concluded.

6. It is, however, evident from the Max-Planck report that this very wide interpretation was not intended. For the report takes it for granted that a mistake as to the value or the marketability of the goods will not normally be sufficient. And yet reasonable persons in the same situation as the parties would certainly not have expected the price to be the same if the value of the goods had been different. The key to the restrictive interpretation adopted by the Max-Planck report is the importation by the report of the additional requirement that the mistake must be "essential", or, to be more precise, the importation of the gloss that the only mistake which can be "of such importance that the contract would not have been concluded on the same terms if the truth had been known" is a mistake which, having regard to usage and commercial practice, reasonable persons would consider to be "essential". To this there are two objections. The first is that if this is the meaning intended, it should be expressed in the text; the second is that even if it were expressed it would introduce a new element of uncertainty. In this connexion it is worth noticing that the Italian Civil Code proceeds on somewhat similar lines in that there is a requirement that the mistake be essential and what is essential is defined in terms, *inter alia*, of what is "determinative of consent".^a But even though the test is much more closely defined, being limited to mistakes as to a "determinative" quality of the thing or the other person, it has given rise to difficulties of interpretation. The meaning given to it is, according to a leading commentary, "not what a superficial reading suggests".^b The qualities to which the courts have regard must, it has been said,^c be "those which by the nature of the thing or by express agreement are to be considered essential to the social function or the economic purpose of the thing". In an international context a test of this kind would give rise to wide variations in application.

7. In short, the objection to article 6 (a) as it stands is that it is unacceptably wide, and the objection to it if it were to be reformulated to express what is contained in the Max-Planck report is that the criterion would be so variously construed that no uniform body of interpretation would develop.

8. An illustration of the scope for divergent interpretations is provided by cases of mistake as to value or as to marketability. As is remarked below (see para. 16), it is difficult to find realistic examples which would not be excluded by one or more of the other provisions of the draft, but one may instance two conceivable fact situations:

^a Article 1429: Mistake is essential (1) when it relates to the nature or the object of the contract; (2) when it relates to the identity of the object of the performance required by the contract or to a quality of that object which, according to common understanding or in relation to the circumstances of the contract, should be considered to be determinative of consent; (3) when it relates to the identity or qualities of the person of the other party, provided that one or the other were determinative of consent; (4) when, in the case of mistake of law, it was the sole or principal reason for the contract.

^b Mirabelli, *Commentario sul Codice Civile*, 2nd ed., IV, 2, *ad loc.*

^c *Rassegna di Giurisprudenza sul Codice Civile*, *ad loc.*

(a) A contract for the sale of a quantity of copper is concluded in ignorance of the fact that the Government of State X has just announced the release of a large amount of the metal from its strategic stocks. The market price falls in consequence.

(b) An importer in State A contracts to buy from a manufacturer in State B a quantity of souvenirs of the President of State B, who is about to celebrate his jubilee and who enjoys considerable popularity in State A. Unknown to both parties the President has died at the moment of conclusion of the contract. If one applies to these cases the test formulated in article 6 (a) as it stands, one must surely say that a reasonable buyer in case (a) would not have bought at the same price, and a reasonable seller would not have expected to sell at the same price. And similarly in case (b) a reasonable buyer would not have bought at all and a reasonable seller would not have expected to sell if it had been known that the President was dead. The Max-Planck report, as has been noted above, takes it for granted that both cases would be excluded, apparently on the ground that the mistake would not be regarded in commercial usage as "essential". But it is difficult to see that there can be a usage as to whether a mistake is essential or not. It is no doubt true that no system of law would allow these mistakes to vitiate the contract, but this is either because the definition of mistake is so restricted as to exclude such matters (as in the Italian Civil Code referred to above^d) or because a specific remedy for lesion is taken to exclude any other remedy for mistake as to value.

Article 6 (b)

(b) The mistake does not relate to a matter in regard to which, in all the relevant circumstances, the risk of mistake was expressly or impliedly assumed by the party claiming avoidance;

9. The difficulty here, as the Secretariat's commentary indicates, is that the concept of assumption of risk, without further elaboration, is very vague. The Max-Planck report suggests that the mistaken party assumes the risk if at the time of the conclusion of the contract "he does not fully know all the relevant facts", with the result that the contract is speculative. But this hardly helps. The most obvious examples of speculative contracts are those in which some of the relevant facts are not known because they lie in the future and each party therefore makes his own guess as to what they will be (e.g. future movements of prices). But mistakes about future facts are specifically excluded by article 8. The facts to which the Max-Planck report refers must therefore be present facts. But whenever a party is mistaken (unless the mistake is one of law) he necessarily "does not know all the relevant facts"; otherwise he would not be mistaken. What the Max-Planck report means presumably is that the mistaken party "does not fully know all the relevant (present) facts and is aware that he does not know them". But in that case he is not mistaken. An example is provided by a recent French case^e in which the buyer, a firm which made ladies' clothes, bought some velvet furnishing material which it intended to make into trousers. The seller knew this, but gave no undertaking as to the cloth's suitability. The cloth proved unsuitable and the buyer sought to avoid the contract on the ground that he was mistaken as to a "substantial quality" in view of which he had entered into the contract, viz. the suitability of the cloth for trousers. It was decided (and the decision was upheld) that the buyer was not mistaken, since he was an expert and knew that the cloth was furnishing material and might not be suitable for trousers.

10. It would seem therefore that the test proposed by the Max-Planck report for determining whether the mistaken party has assumed the risk of his mistake is unhelpful. But unless the concept of assumption of risk is given some closer definition (which does not appear easy) it is likely to be used by courts indiscriminately and unpredictably to exclude plaintiffs who are considered to be in some way undeserving.

Article 6 (c)

(c) The other party has made the same mistake, or has caused

^d Neither value nor marketability are a "quality of the object". Similarly, the German Civil Code confines mistake (in this context) to "qualities of the thing which are regarded in ordinary dealing as essential" (BGB I., para. 119.2).

^e Cass. com. 4 July 1973, D. 1974.538.

the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error.

11. Here, as the Secretariat's commentary points out, the questions whether (i) a mistake was "caused" by the other party, or (ii) the other party's failure to disabuse the mistaken party of his mistake was contrary to "reasonable commercial standards etc." seem certain to give rise to wide divergences of interpretation. In both cases the main problem is that of silence. In case (ii) the question whether the party "ought to have known" and, more particularly, the question whether his silence was contrary to "reasonable commercial standards etc." pose difficult questions because commercial standards in this sphere vary according to the strength given in a particular legal system to the maxim *caveat emptor*. But the difficulty is greater in case (i). Causation is a notoriously elusive concept. The Max-Planck report refers to the Anglo-American doctrine of innocent misrepresentation, and this would provide a workable rule, but it requires a positive representation, except in special circumstances which create a duty to disclose, i.e. a duty not to remain silent. The concept of causation may, however, embrace more than this. For the Max-Planck report says that "silence of the co-contractant may cause the mistake", and this is not confined to such special circumstances (or to cases of bad faith). For the report adds that "[e]ven though [the co-contractant] may have been totally free from blame, he caused the mistake if the course of events leading to the mistake originated in his sphere". It would seem therefore that, on the view taken by the Max-Planck report, if one party's failure to speak is misunderstood by the other party as a representation and the second party in consequence makes a mistake within the meaning of article 6 (a), he may avoid the contract even though the first party had no reason to foresee the misunderstanding.

12. It is not only in cases of silence, however, that the elasticity of the concept of causation may cause difficulties. For example, the Max-Planck report, in its discussion of article 7, says that if an offeror asks for the acceptance to be sent by telegram and, the offeree having complied with this request, there is a mistake in the transmission of the telegram, the offeror may be considered to have caused the mistake. Again, the Max-Planck report, in its discussion of the present clause, says that "[m]ere puff used in advertising or in negotiations in itself is nowhere considered to be a representation", and this is no doubt correct, but the test adopted in the draft text is not that of representation but that of causation, and if causation is given as wide an application as it is in the examples so far considered, it is difficult to see why a puff should not be said to have caused a mistake.

13. In short, this clause also is likely to give rise to a wide variety of interpretation according to the force given by different legal systems to the maxim *caveat emptor* and the concept of causation.

Article 10

1. A party who was induced to conclude a contract by a mistake which was intentionally caused by the other party may avoid the contract for fraud. The same shall apply where fraud is imputable to a third party for whom the other party is responsible.

2. Where fraud is imputable to a third party for whose acts the other contracting party is not responsible, the contract may be avoided for fraud if the other contracting party knew or ought to have known of the fraud.

14. The crucial difficulty lies in the first sentence of clause 1 and its relationship to article 6 (a). If article 6 (a) bears the restricted interpretation which is given to it by the Max-Planck report, the first sentence here is acceptable. For on this interpretation, if the mistake was not caused intentionally the mistaken party may only avoid the contract if he can show that the mistake was "essential", whereas if the mistake was caused intentionally, even an "inessential" mistake will be sufficient, provided that it did in fact induce the mistaken party to conclude the contract. But if article 6 (a) bears the meaning which a normal interpretation would give to it (see above, paras. 5 and 8), the formulation of the first sentence here will lead to obviously unsatisfactory results. For on this interpretation the mistaken party who invokes article 6 (a) need only show that some term of the contract would have been different if the mistake had not been made, whereas under article 10 he must show that the contract would not have been concluded at all. See the Secretariat's commentary on this point.

Article 11

A party may avoid the contract when he has been led to conclude the contract by an unjustifiable, imminent and serious threat.

15. As the Secretariat commentary points out, this very general formulation leaves many questions unanswered. The result will inevitably be that national courts will interpret the article according to the principles which their own systems have adopted in this area, and there will in effect be no uniform law. If this is to be so, it is surely better that there should not be even the appearance of such a law.

Conclusion

16. The observations made above have in common the criticism that the draft is cast in such general terms that no uniform interpretation is likely to emerge, and that, in the case of article 6 (a) in particular, it is capable of bearing an intolerably wide meaning. And yet, paradoxically, this potentially very wide rule is subjected to a number of restrictions (article 6 (b), (c); article 8, and especially article 9^f and article 10^g) which, at least if they are strictly interpreted, make it very difficult to conceive of circumstances likely to arise in international trade in which a plea of mistake could be successfully made.

4. OBSERVATIONS OF THE GERMAN DEMOCRATIC REPUBLIC*

The German Democratic Republic submitted the observations contained in the annex to this note.

ANNEX

Observations of the German Democratic Republic

On the basis of the draft Convention on the Formation of Contracts for the International Sale of Goods considered or deferred for further consideration by the Working Group on the International Sale of Goods of UNCITRAL at its eighth session from 4 to 14 January 1977 in New York, the German Democratic Republic experts, in preparation for the ninth session of the Working Group, are submitting the following proposals for further improving the above-mentioned draft:

1. The present article 6 should be supplemented by a second and third paragraph of the following text:

"(2) A contract of sale is concluded only at the moment the contracting parties have agreed upon all items upon which agreement was to be achieved according to the will of one party.

"(3) A contract of sale is concluded also in case that various contractual conditions are invalid, if it is to be supposed that the parties would have concluded the contract even without these conditions."

2. It is recommended that the following new articles be inserted between articles 10 and 11:

"Article 10 bis

"(1) If a contract of sale has been concluded under a suspen-

^f "The buyer shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford him a remedy based on the non-conformity of the goods with the contract or on the existence of rights of third parties in the goods."

It is not suggested that this restriction is undesirable. On the contrary, whether or not the Uniform Law includes any provisions on mistake, it is surely essential that it should contain something on the lines of this article to prevent a buyer from escaping from the restrictions imposed on the remedy for non-conformity by having recourse to a plea of mistake.

^g "1. The fact that the performance of the assumed obligation was impossible at the time of the conclusion of the contract shall not affect the validity of the contract, nor shall it permit its avoidance for mistake.

"2. The same rule shall apply in the case of a sale of goods that do not belong to the seller."

* Originally issued as A/CN.9/WG.2/WP.30 on 12 August 1977.

sive condition, it will become effective at the moment the condition occurs.

"(2) If a contract has been concluded under a resolutive condition, it will become ineffective at the moment the condition occurs.

"Article 10 ter

"(1) If a contract has been concluded subject to the approval of a third party, it will become effective at the moment this approval is given.

"(2) This will apply also in case the contract was concluded by a representative with reservation as to be approved by the person represented.

"Article 10 quater

"(1) In case a contract of sale is subject to authorization by a state organ, it will become effective only at the moment this authorization has been given.

"(2) In case a contract of sale contravenes a legal prohibition or is aimed at an impossible service, it will be void.

"Article 10 quinquies

"(1) In the cases referred to under article 10 *ter* and article 10 *quater* the other party shall be immediately informed of the granting of the approval or authorization.

"(2) If the information is not given within two months after conclusion of the contract the contract shall be regarded as not concluded."

3. The Hungarian proposal under A/CN.9/WG.2/VIII/CRP.8 should be supplemented by another principle and adopted into the draft Convention:

"In case a party violates the duties of care customary in the preparation and formation of a contract of sale, the other party may claim compensation for the costs borne by it."

C. Note by the Secretary-General: Draft Convention on the Formation of Contracts for the International Sale of Goods (A/CN.9/143)*

1. The Working Group on the International Sale of Goods requested the Secretary-General to circulate the draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods prepared by the International Institute for the Unification of Private Law (UNIDROIT) to Governments and interested international organizations for their comments as to whether any matters in that text which had not been included in the draft Convention on the Formation of Contracts for the International Sale of Goods prepared by the Working Group should be included.¹

2. The text of the draft law prepared by UNIDROIT is set out in the annex to this note.

ANNEX

Draft of a uniform law for the unification of certain rules relating to validity of contracts for the International Sale of Goods²

Article 1

1. The present law applies to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:

(a) Where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;

(b) Where the acts constituting the offer and the acceptance have been effected in the territories of different States;

(c) Where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.

2. Where a party to the contract does not have a place of business, reference shall be made to his habitual residence.

3. The application of the present law shall not depend on the nationality of the parties.

4. In the case of contracts by correspondence, offer and accept-

ance shall be considered to have been effected in the territory of the same State only if the letters, telegrams or other documentary communications which contain them have been sent and received in the territory of that State.

5. For the purpose of determining whether the parties have their places of business or habitual residences in "different States", any two or more States shall not be considered to be "different States" if a valid declaration to that effect made under Article . . . of the Convention dated . . . relating to a Law for the unification of certain rules relating to validity of contracts of international sale of goods is in force in respect of them.

6. The present law shall not apply to contracts of sale:

(a) Of stocks, shares, investment securities, negotiable instruments or money;

(b) Of any ship, vessel or aircraft, which is or will be subject to registration;

(c) Of electricity;

(d) By authority of law or on execution or distress.

7. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production.

8. The present law shall apply regardless of the commercial or civil character of the parties or of the contracts to be concluded.

9. Rules of private international law shall be excluded for the purpose of the application of the present law, subject to any provision to the contrary in the said law.

Article 2

1. The present law shall not apply to the extent that the parties have agreed, expressly or impliedly, that it is inapplicable.

2. However, in the case of fraud and in the case of threat, the present law may not be excluded or departed from to the detriment of the aggrieved party.

Article 3

1. Statements by and acts of the parties shall be interpreted according to their actual common intent, where such an intent can be established.

2. If the actual common intent of the parties cannot be established, statements by and acts of the parties shall be interpreted according to the intent of one of the parties, where such an intent can be established and the other knew or ought to have known what that intent was.

3. If neither of the preceding paragraphs is applicable, the statements by and the acts of the parties shall be interpreted according to the intent that reasonable persons would have had in the same situation as the parties.

* 6 January 1978.

¹ Report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977), A/CN.9/142, para. 305 (reproduced in the present volume, part two, I, A).

² This text was prepared under the auspices of the International Institute for the Unification of Private Law (UNIDROIT). The English and French language versions are the texts approved by the Governing Council of UNIDROIT on 31 May 1972 and set out in the following bilingual publication of UNIDROIT: ETUDE XVI/B, Doc. 22, U.D.P. 1972. The Russian and Spanish versions have been prepared by the United Nations Secretariat.

Article 4

1. In applying the preceding article due consideration shall be given to all relevant circumstances, including any negotiations between the parties, any practices which they have established between themselves, any usages which reasonable persons in the same situation as the parties usually consider to be applicable, the meaning usually given in any trade concerned to any expressions, provisions or contractual forms which are commonly used, and any conduct of the parties subsequent to the conclusion of the contract.

2. Such circumstances shall be considered, even though they have not been embodied in writing or in any other special form; in particular, they may be proved by witnesses.

3. The validity of any usage shall be governed by the applicable law.

Article 5

There is no contract if, under the provisions of the preceding articles, an agreement between the parties cannot be established.

Article 6

A party may only avoid a contract for mistake if the following conditions are fulfilled at the time of the conclusion of the contract:

(a) The mistake is, in accordance with the above principles of interpretation, of such importance that the contract would not have been concluded on the same terms if the truth had been known; and

(b) The mistake does not relate to a matter in regard to which, in all the relevant circumstances, the risk of mistake was expressly or impliedly assumed by the party claiming avoidance; and

(c) The other party has made the same mistake, or has caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error.

Article 7

1. A mistake of law shall be treated in the same way as a mistake of fact.

2. A mistake in the expression or transmission of a statement of intention shall be considered as the mistake of him from whom the statement emanated.

Article 8

A mistake shall not be taken into consideration when it relates to a fact arising after the contract has been concluded.

Article 9

The buyer shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford him a remedy based on the non-conformity of the goods with the contract or on the existence of rights of third parties in the goods.

Article 10

1. A party who was induced to conclude a contract by a mistake which was intentionally caused by the other party may avoid the contract for fraud. The same shall apply where fraud is imputable to a third party for whom the other party is responsible.

2. Where fraud is imputable to a third party for whose acts the other contracting party is not responsible, the contract may be

avoided for fraud if the other contracting party knew or ought to have known of the fraud.

Article 11

A party may avoid the contract when he has been led to conclude the contract by an unjustifiable, imminent and serious threat.

Article 12

1. Avoidance of a contract must be by express notice to the other party.

2. In the case of mistake or fraud, the notice must be given promptly, with due regard to the circumstances, after the party relying on it knew of it.

3. In the case of threat, the notice must be given promptly, with due regard to the circumstances, after the threat has ceased.

Article 13

1. In case of mistake, any notice of avoidance shall only be effective if it reaches the other party promptly.

2. In any event, the notice shall only be effective if it reaches the other party within two years after the conclusion of the contract in the case of mistake or within five years after the conclusion of the contract in the other cases.

Article 14

1. Notice of avoidance shall take effect retroactively, subject to any rights of third parties.

2. The parties may recover whatever they have supplied or paid in accordance with the provisions of the applicable law.

3. Where a party avoids a contract for mistake, fraud or threat, he may claim damages according to the applicable law.

4. If the mistake was at least in part the fault of the mistaken party, the other party may obtain damages from the party who has avoided the contract. In determining damages, the court shall give due consideration to all relevant circumstances, including the conduct of each party leading to the mistake.

Article 15

1. If the co-contractant of the mistaken party declares himself willing to perform the contract as it was understood by the mistaken party, the contract shall be considered to have been concluded as the latter understood it. He must make such a declaration promptly after having been informed of the manner in which the mistaken party had understood the contract.

2. If such a declaration is made, the mistaken party shall thereupon lose his right to avoid the contract and any other remedy. Any declaration already made by him with a view to avoiding the contract on the ground of mistake shall be ineffective.

Article 16

1. The fact that the performance of the assumed obligation was impossible at the time of the conclusion of the contract shall not affect the validity of the contract, nor shall it permit its avoidance for mistake.

2. The same rule shall apply in the case of a sale of goods that do not belong to the seller.

D. Report of the Secretary-General: commentary on the draft Convention on the Formation of Contracts for the International Sale of Goods (A/CN.9/144)*

INTRODUCTION

1. The Working Group on the International Sale of Goods was established at the second session of the

United Nations Commission on International Trade Law. At that session, the Commission at its 44th meeting on 26 March 1969 requested the Working Group to ascertain which modifications of the Hague Convention of 1964 relating to a Uniform Law on the Formation of

* 22 November 1977.

Contracts for the International Sale of Goods might render it capable of wider acceptance by countries of different legal, social and economic systems and to elaborate a new text reflecting such modifications.¹ At its third session the Commission decided that the Working Group should commence its work on formation of contracts when it had completed its work on the revision of the Uniform Law on the International Sale of Goods.²

2. The Working Group completed this mandate at its ninth session by adopting a draft Convention on the formation of contracts for the international sale of goods (A/CN.9/142/Add.1)*

3. The draft Convention will be considered by the United Nations Commission at its eleventh session in 1978. To facilitate that consideration, the Working Group requested the Secretary-General to prepare a commentary on the draft Convention and to circulate the draft Convention together with the commentary to Governments and interested international organizations for their comments.³

COMMENTARY ON THE DRAFT CONVENTION ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AS APPROVED BY THE WORKING GROUP ON THE INTERNATIONAL SALE OF GOODS AT ITS NINTH SESSION

PART I. SUBSTANTIVE PROVISIONS

Chapter I. Sphere of application

Article 1. Scope

(1) This Convention applies to the formation of contracts of sale of goods between parties whose places of business are in different States:

(a) When the States are Contracting States; or

(b) When the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the offer, any reply to the offer, or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the proposed contract is to be taken into consideration.

(4) This Convention does not apply to the formation of contracts of sale:

(a) Of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

- (b) By auction;
- (c) On execution or otherwise by authority of law;
- (d) Of stocks, shares, investment securities, negotiable instruments or money;
- (e) Of ships, vessels or aircraft;
- (f) Of electricity.

(5) This Convention does not apply to the formation of contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(6) The formation of contracts for the supply of goods to be manufactured or produced is to be considered as the formation of contracts of sale of goods unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

7. For the purposes of this Convention:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the proposed contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) If a party does not have a place of business, reference is to be made to his habitual residence.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), article 1.

Convention on the Limitation Period in the International Sale of Goods (Limitation Convention), articles 2, 3, 4, 6.

Draft Convention on the International Sale of Goods as adopted by the United Nations Commission on International Trade Law at its tenth session (CISG), articles 1, 2, 3, 5.

Commentary

1. This article states the rules for determining when this Convention is applicable to the formation of a contract of sale of goods and sets out those contracts the formation of which is excluded from the application of this Convention.

2. Article 1 reproduces articles 1, 2, 3 and 5 of CISG with such minor changes as are necessary for it to apply to the formation of a contract rather than to the contract itself. By using the identical words of CISG, with the minor changes indicated in paragraph 7 below, it is intended that, if the Contracting States designated by article 1 (1) of this Convention are also Contracting States to CISG, the formation of a contract of sale would be subject to this Convention and the contract which results would be subject to CISG.

3. In general, the comments made on the various provisions in the commentary on CISG⁴ are applicable to article 1 of this Convention and need not be repeated. However, a special comment is in order in respect of article 1 (1) (b).

* Reproduced in this volume, part two, I, A, annex.

¹ UNCITRAL, report on the second session (1969), A/7618 (Yearbook... 1968-1970, part two, II, A).

² UNCITRAL, report on the third session (1970), A/8017 (Yearbook... 1968-1970, part two, III, A).

³ Report of the Working Group on the International Sale of Goods on the work of its ninth session, A/CN.9/142, para. 304 (reproduced in the present volume, part two, I, A).

⁴ A/CN.9/116, annex II (Yearbook... 1976, part two, I, 3).

Private international law, paragraph (1) (b)

4. If the rules of private international law designate the law of a Contracting State as the law to be applied, the question is which law of that State governing the formation of contracts of sale of goods is to be applied: the domestic law or this Convention. If the parties to the contract have their places of business in different States, the appropriate law is this Convention.

5. Some legal systems apply the law of different States to different elements of the formation process such as the offer, the acceptance and the required form. In these States, it may not be possible to say that the

rules of private international law would designate the law of any single State as the law governing the formation of the contract.

6. However, in those States whose rules of private international law designate a single law to regulate the matters governed by this Convention, if those rules designate the law of a Contracting State, this Convention is the law to be applied.

Differences between this convention and CISG

7. The differences between the text of this Convention (Formation) and CISG (Sales) in respect of the scope of application are as follows:

Formation		Sales	
Citation	Text	Citation	Text
Art. 1 (1)	"to the formation of contracts"	Art. 1 (1)	"to contracts"
Art. 1 (1)	"between parties"	Art. 1 (1)	"entered into by parties"
Art. 1 (2)	"either from the offer, any reply to the offer"	Art. 1 (2)	"either from the contract"
Art. 1 (3)	"or of the proposed contract"	Art. 1 (3)	"or of the contract"
Art. 1 (4)	"to the formation of contracts of sale"	Art. 2	"to sales"
Art. 1 (4) (a)	"at any time before or at the conclusion of the contract"	Art. 2 (a)	"at the time of the conclusion of the contract"
Art. 1 (5)	"to the formation of contracts"	Art. 3 (1)	"to contracts"
Art. 1 (6)	"The formation of contracts . . . is to be considered as the formation of contracts of sale of goods"	Art. 3 (2)	"Contracts for . . . are to be considered sales"
Art. 1 (7) (a)	"to the proposed contract"	Art. 5 (a)	"to the contract"
Art. 1 (7) (a)	"at any time before or at the conclusion of the contract"	Art. 5 (a)	"at the time of the conclusion of the contract"

Article 2. Autonomy of parties

(1) The parties may agree to exclude the application of this Convention.

(2) Unless the Convention provides otherwise, the parties may agree to derogate from or vary the effect of any of its provisions as may appear from the negotiations, the offer or the reply, the practices which the parties have established between themselves or from usages.

(3) Unless the parties have previously agreed otherwise, a term of the offer stipulating that silence shall amount to acceptance is not effective.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 2.

Limitation Convention, article 3 (3).

CISG, article 4.

Commentary

1. Article 2 recognizes the general principle of party autonomy. Although slightly different in presentation from article 4 of CISG, paragraphs (1) and (2) of this article state the same basic rules as are set forth in that Convention.

Exclusion of the application of the Convention, paragraph (1)

2. Paragraph (1) states that the parties may agree to

exclude the application of the Convention as a whole. The most likely manner in which the parties would act to exclude the application of this Convention would be by the choice of the law of a non-Contracting State to govern the formation of the contract. It would be a matter of interpretation of the intention of the parties in a given case as to whether the choice of the law of a non-Contracting State to govern "the contract" was also a choice of that law to govern the formation of the contract.

3. If the parties exclude the application of this Convention without specifying the law to be applied, the rights and obligations of the parties in respect of the formation of the contract would be governed by the law made applicable by the rules of private international law.

Derogation from the provisions of this Convention, paragraph (2)

4. Paragraph (2) enables the parties, unless the Convention otherwise provides, to agree to derogate from or vary the effect of any of the individual provisions of this Convention.

5. Such a derogation from or variation of the effects of this Convention can occur only by agreement of the parties. It was not considered to be appropriate to allow one party, who would normally be the offeror, to change by his unilateral act the rules provided by this Convention as to the formation of the contract.

6. By necessity the agreement between the parties in respect of any derogation of this Convention must

precede the conclusion of the contract of sale. If agreement as to the rules to be followed in respect of the formation of the contract was reached as part of the conclusion of the contract of sale itself, that agreement would become binding on the parties only if the contract of sale was concluded. A decision as to whether that contract was concluded could be reached only under the applicable law, which law would be this Convention if, according to article 1, the formation of the contract came within the scope of application of this Convention.

7. Such prior agreement will exist in many cases. Parties often agree to use standard contract forms or general conditions of sale prior to agreement on the specific elements of the contract, such as the quantity or the price of the goods, and such forms and general conditions often include provisions in respect of the formation of the contract. Agreement may also be found from the past practice of these parties or from the existence of a usage in the trade to use such forms or general conditions.

8. It should be noted that a number of articles in this Convention anticipate that the offeror by his unilateral act can effectively provide a different rule from the normal rule as it is set forth in that article. For example, article 8 (2) provides that "a proposal other than one addressed to one or more specific persons" is to be considered merely as an invitation to make offers. However, if the offeror clearly indicates that the proposal is to be considered as an offer, it will be so considered if it meets the other criteria set forth in article 8. Similarly, article 12 (3) makes it clear that if the offer indicates that it may be accepted by the performance of an act, such as one relating to the shipment of the goods without notice to the offeror, such an acceptance is effective at the moment the act is performed even though the normal rule under article 12 (2) is that an acceptance is effective at the moment the indication of assent reaches the offeror.

9. However, if the article does not specifically allow for such a derogation from the normal rule, that rule can be derogated from or its effect can be varied only by the prior mutual agreement of the parties.

10. It should be noted that article 13 cannot be used to achieve a contrary result. If article 13 were understood to mean that the offeror could specify in the offer a method of acceptance different from that provided by this Convention which had to be followed by the offeree, it would mean that the offeror could unilaterally derogate from or vary the effect of the provisions of this Convention.

Example 2A: Clause 2.1 of the Economic Commission for Europe General Conditions No. 574 for the Supply of Plant and Machinery for Export provides that "The contract shall be deemed to have been entered into when, upon receipt of an order, the Vendor has sent an acceptance in writing within the time-limit (if any) fixed by the Purchaser". This clause would derogate from the provisions of this Convention in two respects: first, the acceptance must be in writing, whereas article 3 (1) provides that the contract need not be in writing and may be proved by any means, including witnesses and, second, the acceptance will be effective when sent rather than when it reaches the offeror as provided in article 12 (2).

Example 2A.1: In the negotiations leading to the

eventual offer the parties agreed to contract on the basis of the ECE General Conditions No. 574. In this case clause 2.1 would be applicable. Therefore, the acceptance would have to be in writing and, if so made, it would be effective when sent.

Example 2A.2: Nothing was said in the negotiations leading to this contract about the use of ECE General Conditions No. 574. However, in the past it had been established that the parties expected to rely upon those General Conditions and had, in fact, referred to them as governing the performance of other contracts in which there had been no mention of them in the negotiations. In this case, in determining the intent a reasonable person would have had in respect of the conclusion of the contract, it might be found under article 4 (3) that the parties intended to rely upon ECE General Conditions No. 574. If this intent were found, clause 2.1 would be applicable. Therefore, the acceptance would have to be in writing and, if so made, it would be effective when sent.

Example 2A.3: A sent to B an order for goods and attached ECE General Conditions No. 574, stating that they constituted part of the offer. This was the first time these two parties had ever communicated with each other. B accepted the offer by telephone. The acceptance was effective even if A protested that the acceptance had to be in writing since, at the time of the acceptance, there was no agreement between the parties to use clause 2.1 in order to derogate from or vary the effect of this Convention.

Example 2A.4: As in example 2A.3, A sent to B an order for goods and attached ECE General Conditions No. 574, stating that they constituted part of the offer. This was the first time these two parties had ever communicated with each other. B accepted the offer in writing. The acceptance was effective at the moment it reached the offeror, as provided in article 12 (2), not at the moment sent as provided in ECE General Conditions No. 574. If this was not the result, there would be the difficult conceptual problem that the agreement of the parties to be bound by the provisions of clause 2.1 of ECE General Conditions No. 574 would be effective under this Convention at the time the acceptance reached the offeror, and that as a consequence the acceptance of the offer in respect of the contract of sale would be effective at the earlier moment when it was sent.

Silence as acceptance, paragraph (3)

11. Article 2 (3) states a general rule that a term of the offer which stipulates that silence shall amount to acceptance is not effective. However, such a term in the offer can be effective if the parties have previously so agreed. Such an agreement may be explicit or it may be established by an interpretation of the intent of the parties as a result of the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties as provided by the rules of interpretation in article 4.

12. Article 2 (3) must be read in conjunction with article 12 (1) which provides that "Silence shall not in itself amount to acceptance". That provision indicates that silence when coupled with something else may amount to acceptance.

Example 2B: For the past 10 years the buyer regularly ordered goods that were to be shipped throughout the period of six to nine months following each order. After the first few orders the seller never acknowledged the orders but always shipped the goods as ordered. On the occasion in question the seller neither shipped the goods nor notified the buyer that he would not do so. The buyer would be able to sue for breach of contract on the basis that a practice had been established between the parties that the seller did not need to acknowledge the order and, in such a case, the silence of the seller constituted acceptance of the offer.

Example 2C: One of the terms in a concession agreement was that the seller was required to respond to any orders placed by the buyer within 14 days of receipt. If he did not respond within 14 days, the order would be deemed to have been accepted by the seller. On 1 July the seller received an order for 100 units from the buyer. On 25 July the seller notified the buyer that he could not fill the order. In this case a contract was concluded on 15 July for the sale of 100 units.

Chapter II. General provisions

Article 3. Form

(1) A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

(2) Paragraph (1) of this article does not apply to a contract of sale where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

Uniform Law on the International Sale of Goods (ULIS), article 15.

ULF, article 3.

CISG, article 11.

Commentary

1. Article 3 is virtually identical to article 11 of CISG.

2. Although contracts for the international sale of goods are usually in writing, the fact that many contracts are concluded by modern means of communication which do not always involve a written contract led to the decision to include this provision. However, the rule that the contract need not be in writing is subject to three exceptions.

3. Firstly, the parties may agree prior to the conclusion of the contract that the contract must be in writing. If they so agree, their agreement takes precedence over the terms of this Convention. See example 2A, and especially example 2A.1.

4. Secondly, any administrative or criminal sanctions for breach of the rules of any State requiring that contracts for the international sale of goods be in writing, whether for purposes of administrative control of

the buyer or seller, for purposes of enforcing exchange control laws, or otherwise, would still be enforceable against a party which concluded the non-written contract. However, the contract itself would be enforceable between the parties.

5. Thirdly, under article (X) a State whose legislation requires a contract of sale to be concluded in or evidenced by writing may make a declaration to the effect that article 3 (1) shall not apply to any sale involving a party having his place of business in a Contracting State which has made such a declaration. Such a declaration does not reverse the rule in article 3 (1) and create a requirement under this Convention that the contract be concluded in or evidenced by writing. Instead, it has the effect of eliminating from this Convention any rule on the subject of the form in which those contracts must be concluded or evidenced, leaving the determination of the issue to the applicable national law as determined by the rules of private international law of the forum.

6. The last sentence of article 3 (2) makes it clear that the individual parties to the transaction may not by their private agreement derogate from the effect of such a declaration.

Article 4. Interpretation*

(1) Communications, statements and declarations by and conduct of a party are to be interpreted according to his intent where the other party knew or ought to have known what that intent was.

(2) If the preceding paragraph is not applicable, communications, statements and declarations by and conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

PRIOR UNIFORM LAW

ULIS, article 9 (3).

ULF, articles 4 (2), 5 (3), 11 and 13 (2).

UNIDROIT Draft of a Law for the Unification of Certain Rules relating to Validity of Contracts of International Sale of Goods (draft Law on Validity), articles 3, 4 and 5.

Commentary

Scope of application

1. Article 4 on interpretation, as is the case with all of the provisions in this draft Convention, relates only to the formation process. This article does not provide rules for interpreting the contract of sale, once a contract of sale has been concluded.

* The Working Group on the International Sale of Goods noted that article 4 had no equivalent in the draft Convention on the International Sale of Goods.

2. Questions of interpretation can arise in a number of ways in the formation process. It may be necessary to determine whether a given communication which appeared to be "sufficiently definite" to be an offer under article 8 also "indicate[d] the intention of the offeror to be bound in case of acceptance". Or, the offeror and the offeree may use identical words in the purported offer and acceptance but collateral evidence may make it clear that they did not understand those words in the same way. Conversely, the communications between the parties may themselves not contain the information necessary for an offer and an acceptance, but extrinsic evidence may contain the missing information. In all these cases the rules of interpretation may be called on to help in the determination whether there has been sufficient agreement between the parties to decide that a contract has been concluded.

Example 4A: A sent B a letter stating that he offered to sell equipment to be manufactured with the only specifications being the kind and quantity of the goods and a price of Swiss francs 10,000,000. It would normally be the case that a seller would not be expected to contract for such a large sale without specification of delivery dates, quality standards, etc. Therefore, the lack of any indication in respect of these matters raises the question of interpretation of the letter as to whether the seller had the intention to be bound to a contract in case of acceptance.

Example 4B: The parties agreed upon the sale of cotton to arrive "ex Peerless" from Bombay without either party realizing that there were two ships named "Peerless" leaving Bombay several months apart. The buyer had in mind the ship that sailed in October, and the seller had in mind the ship that sailed in December. Therefore, by interpretation of the offer and the purported acceptance it was evident that there was no agreement on the subject-matter of the sale, the cotton on the October "Peerless" or the cotton on the December "Peerless" and, therefore, that there was no contract.

Example 4C: A sent B a telegram stating "Will send 100". B replied "Agreed". Although such a cryptic exchange of messages does not by itself have sufficient content to constitute an offer and an acceptance, by the use of the rules of interpretation in article 4, and especially the past practices of the parties, adequate meaning might be given to the exchange of telegrams to find that a contract existed.

Content of the rules of interpretation

3. Since article 4 is for the interpretation of the communications, statements and declarations by and conduct of the parties for the purposes of determining whether a contract exists, it cannot be said that there is an actual common intent of the parties. However, article 4 (1) recognizes that the other party often knows or ought to know the intent of the party who sent the communication or engaged in the conduct in question. Where this is the case, that is the meaning to be given to that communication or conduct.

4. If the party who sent the communication or engaged in the conduct had no intention on the point in question or if the other party did not know what that intent was, article 4 (1) cannot be applied. In such a

case, article 4 (2) provides that the communications, statements and declarations by and conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

5. It would be rare if neither article 4 (1) nor article 4 (2) could be applied. However, in a rare case, such as that in example 4B, neither party would have known or ought to have known the other party's intent and a reasonable person would not have been able to establish a meaning to the words used. In such a situation a tribunal would be required to find that there had not been the agreement on the subject-matter of the contract necessary for the conclusion of a contract.

6. In determining the intent of a party or the intent a reasonable person would have had in the same circumstances, it is necessary to look first to the words actually used or the conduct engaged in. However, the investigation is not to be limited to those words or conduct even if they appear to give a clear answer to the question. It is common experience that a person may dissimulate or make an error and the process of interpretation set forth in this article is to be used to determine the true content of the communication. If, for example, a party offers to sell a quantity of goods for Swiss francs 50,000 and it is obvious that the offeror intended Swiss francs 500,000 and the offeree knew or ought to have known it, the price term in the offer is to be interpreted as Swiss francs 500,000 for the purpose of determining whether a contract has been concluded.

7. In order to go beyond the apparent meaning of the words or the conduct by the parties, article 4 (3) states that "due consideration is to be given to all relevant circumstances of the case". It then goes on to enumerate some, but not necessarily all, circumstances of the case which are to be taken into account. These include the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

8. Since article 4 applies only to the interpretation of the words and conduct of the parties for the purposes of determining whether and when a contract was concluded, the provision in article 4 (3) that the negotiations between the parties are among the circumstances to be used to interpret those words and conduct does not raise the problems which it would if the negotiations were to be used to determine the meaning of the contract.

9. Article 4 is particularly useful in cases such as that in example 4C. Although the specific communication which is the offer does not contain the elements necessary for the offer to be "sufficiently definite" under article 8, the negotiations give the missing content and an offer exists.

10. However, it is a complex and perhaps insoluble problem to determine the extent to which preliminary agreements or statements made during the process of negotiations should be used to explain, to supplement or to contradict the words of "the contract" in order to determine its substantive content. None of these problems are raised by article 4.

11. Similarly, the potentially difficult theoretical problems of interpreting the substantive content of the contract by the subsequent conduct of the parties is not raised by article 4 (3). However, if the subsequent con-

duct of the parties shows that the "offeror" intended to be bound in case of acceptance, even though the "offer" was not clear in that respect, or that the two parties understood that the cotton sold in example 4B was the cotton on the October "Peerless", this conduct is to be taken into account in determining that a contract was concluded.

*Article 5. Fair dealing and good faith**

In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith.

PRIOR UNIFORM LAW

None.

Commentary

1. This article sets forth in general form a basic principle which runs throughout this Convention. The principle involved is that in the formation of contracts of international sale of goods, as in all commercial transactions, the parties must observe the principles of fair dealing and act in good faith.

2. There are a number of specific applications of this principle in particular provisions of this Convention such as article 2 (3) which makes ineffective, unless the parties have previously agreed, a term in the offer stipulating that silence shall amount to acceptance; article 10 (2) (c) on the non-revocability of an offer where it was reasonable for the offeree to rely upon the offer being held open and the offeree has acted in reliance on the offer; and article 15 (2) on the status of a late acceptance which was sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time.

3. The principle is, however, broader than these examples and applies to every aspect of the formation of the contract.

Article 6. Usage

For the purposes of this Convention usage means any practice or method of dealing of which the parties knew or ought to have known and which in international trade is widely known to and regularly observed by parties to contracts of the type involved in the particular trade concerned.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULIS, articles 9 (1) and 9 (2).

ULF, article 13 (1).

CISG, article 7.

Commentary

1. Article 6 is modeled on article 7 of CISG. However, it differs from CISG in one important respect.

* The Working Group on the International Sale of Goods noted that article 5 had no equivalent in the draft Convention on the International Sale of Goods.

2. Article 7 of CISG is a substantive provision which states that any "usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned" is made applicable to the contract. In this Convention, however, a "usage" is made applicable to the transaction by virtue of articles 2 (2) and 4 (3). The function of article 6 is to define what constitutes a "usage" within the context of those articles of this Convention.

3. By virtue of a usage the parties may be found to have derogated from or varied the effect of one of the provisions of this Convention under article 2 (2). Similarly, article 4 (3) provides that the intent of a party or the understanding a reasonable person would have had in the same circumstances is to be found by taking into consideration any relevant usages.

Article 7. Communications

(1) For the purposes of this Convention an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

(2) Paragraph (1) of this article does not apply to an offer, declaration of acceptance or any other indication of intention if any of them is made in any other form than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 12.

CISG, article 10.

Commentary

1. Article 7 provides that any indication of intention "reaches" the addressee when it is delivered to him, not when it is dispatched.

2. One consequence of this rule, as set out in articles 9 and 16, is that an offer, whether revocable or irrevocable, or an acceptance may be withdrawn if the withdrawal reaches the other party before or at the same time as the offer or the acceptance which is being withdrawn. Furthermore, an offeree who learns of an offer from a third person prior to the moment it reaches him may not accept the offer until it has reached him. Of course, a person authorized by the offeror to transmit the offer is not a third person in this context.

3. An offer, an acceptance or other indication of intention reaches the addressee when it is delivered to "his place of business or mailing address". In such a case it will have legal effect even though some time may pass before the addressee, if the addressee is an individual, or the person responsible, if the addressee is an organization, knows of it.

4. When the addressee does not have a place of

business or a mailing address, and only in such a situation, an indication of intention "reaches" the addressee on delivery to his habitual residence, i.e. his personal abode. As with an indication of intention delivered to the addressee's place of business or mailing address, it will produce its legal effect even though the addressee may not know of its delivery.

5. In addition the indication of intention "reaches" the addressee whenever it is made personally to him, whether orally or by any other means. There are no geographical limitations on the place at which personal delivery can be made. In fact such delivery is often made directly to the addressee at some place other than his place of business. Such delivery may take place at the place of business of the other party, at the addressee's hotel, or at any other place at which the addressee may be located.

6. Personal delivery to an addressee which has legal personality means personal delivery to an agent who has the requisite authority. The question as to who would be an authorized agent is left to the applicable national law.

Declaration of non-applicability, paragraph (2)

7. The declaration of non-applicability envisaged by paragraph (2) goes only to an indication of intention in any form other than in writing. However, even in a State which made such a declaration, article 7 (1) would have full effect in respect of any indication of intention which was in writing.

Chapter III. Formation of the contract

*Article 8. Offer**

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

(3) A proposal is sufficiently definite if it indicates the kind of goods and fixes or makes provision for determining the quantity and the price. Nevertheless, if a proposal indicates the intention to conclude the contract even without making provision for the determination of the price, it is considered as proposing that the price be that generally charged by the seller at the time of the conclusion of the contract or, if no such price is ascertainable, the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 4.

ULIS, article 57.

CISG, article 37.

* Ghana and the Union of Soviet Socialist Republics expressed formal reservations to the second sentence of paragraph (3) of this article.

Commentary

1. Article 4 states the conditions that are necessary in order for a proposal to conclude a contract to constitute an offer.

Proposal sent to one or more specific persons

2. In order for a person to accept an offer, that offer must have been addressed to him. In the usual case, the requirement causes no difficulties since the offer to buy or sell goods will have been addressed to one specific person or, if the goods are to be bought or sold by two or more persons acting together, to those specific persons. The specifications of the addressee will usually be by name, but it could be made in some other way such as "the owner or owners of...".

3. It is also possible that an offer to buy or sell will be made simultaneously to a large number of specific persons. An advertisement or catalogue of goods available for sale sent in the mail directly to the addressees would be sent to "specific persons", whereas the same advertisement of catalogue distributed to the public at large would not. If an advertisement or catalogue sent to "specific persons" indicated the intention to be bound to a contract in case of acceptance and if it was "sufficiently definite", it would constitute an offer under article 8 (1).

Proposal sent to other than one or more specific persons, paragraph (2)

4. Some legal systems restrict the concept of an offer to communications addressed to one or more specific persons while other legal systems also admit of the possibility of a "public offer". Public offers are of two types, those in which the display of goods in a store window, vending machine or the like are said to be a continuing offer to any person to buy that article or one identical to it, and advertisements directed to the public at large. In those legal systems which admit of the possibility of a public offer, the determination as to whether an offer in the legal sense has been made depends upon an evaluation of the total circumstances of the case, but does not necessarily require a specific indication of intention to make an offer. The fact that the goods are on display for sale or the wording of the advertisement may be enough for a court to determine that there was a legal offer.

5. This Convention, in article 8 (2), takes a middle position in respect of public offers. It states that a proposal other than one addressed to one or more specific persons is normally to be treated merely as an invitation for the recipients to make offers. However, it constitutes an offer if it meets the other criteria for being an offer and the intention that it be an offer is clearly indicated. Such an indication need not be an explicit statement such as "this advertisement constitutes an offer" but it must clearly indicate an intention to make an offer, for example, by a statement that, "these goods will be sold to the first person who presents cash or an appropriate banker's acceptance".

Intention to be bound, paragraph (1)

6. In order for the proposal for concluding a contract to constitute an offer, it must indicate "the intention of the offeror to be bound in case of acceptance".

Since there are no particular words which must be used to indicate such an intention, it may sometimes require a careful examination of the "offer" in order to determine whether such an intention existed. This is particularly true if one party claims that a contract was concluded during negotiations which were carried on over an extended period of time, and no single communication was labelled by the parties as an "offer" or as an "acceptance". Whether there is the requisite intention to be bound in case of acceptance will be established in accordance with the rules of interpretation contained in article 4.

7. The requirement that the offeror has manifested his intention to be bound refers to his intention to be bound to the eventual contract if there is an acceptance. It is not necessary that he intends to be bound by the offer, i.e. that he intends the offer to be irrevocable. As for the revocability of offers, see article 10.

An offer must be sufficiently definite, paragraphs (1) and (3)

8. Paragraph (1) states that a proposal for concluding a contract must be "sufficiently definite" in order to constitute an offer. Paragraph (3) states that an offer is sufficiently definite if it:

Indicates the kind of goods, and

Fixes or makes provision for determining the quantity, and

Fixes or makes provision for determining the price.

The fact that the proposal for concluding a contract is sufficiently definite may be established by interpretation of the proposal in accordance with the rules of interpretation contained in article 4.

9. The remaining terms of the contract resulting from the acceptance of an offer which only indicates the kind of goods and fixes or makes provision for determining the quantity and the price would be supplied by usage or by the applicable law of sales. If, for example, the offer contained no term as to how or when the price was to be paid, CISG provides in article 39 (1) that the buyer must pay it at the seller's place of business and article 40 (1) provides that he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal. Similarly, if no delivery term is specified, article 15 of CISG provides how and where the goods are to be delivered and article 17 provides when they are to be delivered.

10. Nevertheless, the fact that a proposal contains only the three terms necessary for the offer to be sufficiently definite may indicate, in a given case, that there was no intention on the part of the offeror to be bound in case of acceptance. For example, it would be necessary to interpret the proposal to determine whether there was an intention to be bound in case of acceptance where a seller offered to sell equipment to be manufactured with the only specifications being the kind and quantity of the goods and a price of Swiss francs 10 million. It would normally be the case that a seller would not contract for such a large sale without specification of delivery dates, quality standards, etc. Therefore, the lack of any indication in respect of these matters suggests that there might have been as yet no intention to be bound to a con-

tract in case of acceptance. However, even in the case of such a large and complicated sale, the applicable law of sales can supply all of the missing terms if the intention to contract is found to have existed.

Quantity of the goods, paragraph (3)

11. Although, according to article 8 (3), the proposal for concluding a contract will be sufficiently definite to constitute an offer if it fixes or makes provision for the quantity of goods, the means by which the quantity is to be determined is left to the entire discretion of the parties. It is even possible that the formula used by the parties may permit the parties to determine the exact quantity to be delivered under the contract only during the course of performance.

12. For example, an offer to sell to the buyer "all I have available" or an offer to buy from the seller "all my requirements" during a certain period would be sufficient to determine the quantity of goods to be delivered. Such a formula should be understood to mean the actual amount available to the seller or the actual amount required by the buyer in good faith.

13. It appears that most, if not all, legal systems recognize the legal effect of a contract by which one party agrees to purchase, for example, all of the ore produced from a mine or to supply, for example, all of the supplies of petroleum products which will be needed for resale by the owner of a service station. In some countries such contracts are considered to be contracts of sale. In other countries such contracts are denominated as concession agreements or otherwise, with the provisions in respect of the supply of the goods considered to be ancillary provisions. Article 8 (3) makes it clear that such a contract is enforceable even if it is denominated by the legal system as a contract of sale rather than as a concession agreement.

Price, paragraph (3)

14. The first sentence of article 8 (3) provides that the proposal for concluding a contract must fix or make provision for determining the price in order for it to constitute an offer. However, the second sentence indicates that this is not necessary if the "proposal indicates the intention to conclude the contract even without making provision for the determination of the price." In such a case, the last portion of the second sentence repeats the language of article 37 of CISG which provides the formula for determining the price.

15. It should be noted that the formula to be used if the second sentence of article 8 (3) applies would determine the price on the basis of that prevailing at the time of the conclusion of the contract, i.e. "at the moment the indication of assent reaches the offeror".⁵ If at that moment there was no price generally charged by the seller or generally prevailing for such goods sold under comparable circumstances, the second sentence of article 8 (3) could have no effect and no legally effective offer would have been made.

16. The situation for which the price provision in

⁵ Article 12 (2). The contract may, in certain circumstances, also be concluded by the performance of an act. See article 12 (3) and the commentary thereto.

article 8 (3) is primarily intended is that in which a buyer sends an order to buy goods from a catalogue or to buy spare parts. In such a case he may make no specification of the price at the time of placing the order. Even if the seller does not specify a price in his acceptance of the order, it was thought that a contract should be held to have been concluded and that, for example, the seller should not later be able to claim that the price was that prevailing at the time of delivery of the goods, where that price was higher than the one the seller was charging at the time of the conclusion of the contract.

Article 9. Time of effect of offer

The offer becomes effective when it reaches the offeree. It is withdrawn if the withdrawal reaches the offeree before or at the same time as the offer even if it is irrevocable.

PRIOR UNIFORM LAW

ULF, article 5.

Commentary

Article 9 provides that an offer becomes effective when it reaches the offeree. Until this time the offeree may not accept the offer and the offeror may withdraw it, even if it is irrevocable. Therefore, if the offeree, having learned of the dispatch of the offer by some means, purported to accept the offer, the offeror could nevertheless withdraw it until it reached the offeree.

Article 10. Revocability of offer

(1) The offer is revoked if the revocation reaches the offeree before he has dispatched his acceptance.

(2) However, an offer cannot be revoked:

(a) If the offer indicates that it is firm or irrevocable; or

(b) If the offer states a fixed period of time for acceptance; or

(c) If it was reasonable for the offeree to rely upon the offer being held open and the offeree has acted in reliance on the offer.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 5.

Commentary

Revocation of an offer, paragraph (1)

1. Article 10 states that offers are in general revocable and that the revocation is effective when it reaches⁶ the offeree. However, the right of the offeror to revoke his offer terminates on the occurrence of one of two events.

2. Under this Convention the less typical of the two events is that the offeree has made an effective acceptance and that the contract is, therefore, concluded. Such a result occurs in those cases in which the offeree orally accepts the offer and in those cases in which the

offeree accepts the offer in conformity with article 12 (3).

3. Under article 12 (3) if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent without giving notice to the offeror by performing an act, such as one relating to the dispatch of the goods or payment of the price, the acceptance is effective at the moment the act is performed. Since the acceptance is effective and the contract is concluded at the moment the act is performed, the right of the offeror to revoke his offer terminates at that same moment. This result follows without having been set out specifically in this Convention.

4. In the more typical case in which the offer is accepted by a written indication of assent, article 10 (1) provides that the right of the offeror to revoke his offer terminates at the moment the offeree has dispatched his acceptance, and not at the moment the acceptance reaches the offeror. This rule was adopted even though article 12 (2) provides that it is at this later moment that the acceptance is effective and the contract is therefore concluded in accordance with article 17.

5. The value of a rule that a revocable offer becomes irrevocable prior to the moment at which the contract is concluded lies in the fact that it contributes to an effective compromise between the theory of general revocability of offers and the theory of general irrevocability of offers. Although all offers except those which fall within the scope of article 10 (2) are revocable, they become irrevocable once the offeree makes his commitment by dispatching the acceptance.

Irrevocable offers, paragraph (2)

6. Article 10 (2) sets forth three situations in which the irrevocability of the offer is a result of the nature of the offer.

7. Subparagraphs (a) and (b) are similar in that irrevocability arises out of the wording used in the offer. Subparagraph (a) governs the situation in which the offer indicates that it is firm or irrevocable. Subparagraph (b) governs the situation in which the offer states a fixed time for acceptance.

8. It should be noted that neither provision requires either a promise on the part of the offeror not to revoke or any promise, act or forbearance on the part of the offeree.

9. Both provisions reflect the judgement that in commercial relations, and particularly in international commercial relations, the offeree should be able to rely on any statement by the offeror which indicates that the offer will be open for a period of time. Therefore, if the offer indicates that the offer is firm or irrevocable for a certain period of time, the offer is irrevocable under this Convention for that period of time. If the offer states that it is firm or irrevocable without stating a period of time, it is irrevocable until the offer lapses under article 12 (2). If the offer states a fixed time for acceptance by a formula such as "you have until 1 June to accept this offer" or "if I have not received your acceptance by 1 June, I will send the goods to someone else", the offer is irrevocable until the end of the period for acceptance, i.e. until 1 June in these cases.

10. The third situation in which the offeror cannot

⁶ Article 7 (1) contains a definition of the term "reaches".

revoke his offer under article 10 (2) is that it was reasonable for the offeree to rely upon the offer being held open and the offeree has acted in reliance on the offer. This would be of particular importance where the offeree would have to engage in extensive investigation to determine whether he should accept the offer. Even if the offer does not indicate that it is irrevocable, it should be irrevocable for the period of time necessary for the offeree to make his determination.

Article 11. Termination of offer by rejection

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

None.

Commentary

1. Once the offeror has received a rejection of an offer, he should be free to contract with someone else without concern that the offeree will change his mind and attempt to accept the offer which he had previously rejected. Most, if not all, legal systems accept this solution in respect of revocable offers. Many legal systems also accept it in respect of irrevocable offers, but some legal systems hold that an irrevocable offer is not terminated by a rejection. Article 11 accepts the solution in respect of both revocable and irrevocable offers and provides that an offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

2. An offer may be rejected either expressly or by implication. In particular, article 13 (1) provides that "a reply to an offer containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer". Although a tribunal may find that a given communication from the offeree to the offeror which contained inquiries about possible changes in the terms or which proposed different terms was an independent communication and, therefore, that it did not fall under article 13 (1), if the communication was found to contain additions, limitations or other modifications to the offer, the offer would be rejected and the offeree could no longer accept it.

3. Of course, the rejection of an offer by a reply which contains additions, limitations or other modifications of the offer does not make it impossible to conclude a contract. The reply would constitute a counter-offer which the original offeror might accept. If the additions, limitations or other modifications did not materially alter the terms of the offer, article 13 (2) provides that the reply would constitute an acceptance and the terms of the contract are the terms of the offer with the modifications contained in the acceptance. If the offeror rejected the proposed additions, limitations or other modifications, the parties could agree to contract on the terms of the original offer.

4. Therefore, in the context of a reply to an offer which constitutes an explicit or implicit rejection, the significance of article 11 is that the original offer terminates and any eventual contract must be concluded on the basis of a new offer and acceptance.

Article 12. Acceptance

(1) A declaration or other conduct by the offeree indicating assent to an offer is an acceptance. Silence shall not in itself amount to acceptance.

(2) Subject to paragraph 3 of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. It is not effective if the indication of assent does not reach the offeror within the time he has fixed or if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down by the second and third sentences of paragraph 2 of this article.

(4) This article does not apply to the acceptance of an offer in so far as the acceptance is allowed otherwise than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, articles 2 (2), 6 and 8.

Commentary

1. Article 12 sets out the conduct of the offeree which constitutes acceptance and the moment at which an acceptance is effective.

Acts constituting acceptance, paragraph (1)

2. Most acceptances are in the form of a declaration by the offeree indicating assent to an offer. However, article 12 (1) recognizes that other conduct by the offeree indicating assent to the offer may also constitute an acceptance.

3. In the scheme used in this Convention, any conduct indicating assent to an offer is an acceptance. However, subject to the special case governed by article 12 (3), article 12 (2) provides that the acceptance is effective only at the moment the indication of assent reaches the offeror.

4. Article 12 (1) also makes it clear that silence in itself does not amount to acceptance. However, if the silence is coupled with other factors which give sufficient assurance that the silence of the offeree is an indication of assent, the silence can constitute acceptance. For a further discussion of silence as acceptance, see paragraph 6 below and the commentary to article 2 (3).

Moment at which acceptance by declaration is effective, paragraph (2)

5. Article 12 (2) provides that an acceptance is effective only at the moment a notice of that acceptance reaches the offeror. Therefore, no matter what is the form of the acceptance under article 12 (1), a notice of that acceptance must in some manner reach the offeror in order to bring about the legal consequences associated with the acceptance of an offer.

6. There are two exceptions to this rule. The first exception is mentioned in the opening words of article 12 (2) which state that the rule is subject to article 12 (3). Under article 12 (3), in certain limited circumstances, it is possible for an offer to be accepted by the performance of an act without the necessity of a notice. The other exception follows from the general rule in article 2 (2) that the parties may agree to derogate from or vary the effect of any provision of this Convention. In particular, if they have agreed that the silence of the offeree will constitute acceptance of the offer, they have by implication also agreed that no notice of that acceptance is required.⁷

7. It is not necessary that the indication of assent required by article 12 (2) be sent by the offeree. A third party, such as a carrier or a bank, may be authorized to give to the offeror the notice of the conduct which constitutes acceptance. It is also not necessary for the notice to state explicitly that it is notice of acceptance, so long as it is clear from the circumstances surrounding the notice that the conduct of the offeree was such as to manifest his intention to accept.

8. Article 12 (2) adopts the receipt theory of acceptance. The indication of assent is effective when it reaches the offeror, not when it is dispatched as is the rule in some legal systems.

9. Article 12 (2) states the traditional rule that an acceptance is effective only if it reaches the offeror within the time fixed or, if no such time was fixed, within a reasonable time. However, article 15 provides that an acceptance which arrives late is, or may be, considered to have reached the offeror in due time. Nevertheless, the sender-offeree still bears the risk of non-arrival of the acceptance.

Acceptance of an offer by an act, paragraph (3)

10. Article 12 (3) governs the limited but important situation in which the offer, the practices which the parties have established between themselves or usage permit the offeree to indicate assent by performing an act without notice to the offeror. In such a case the acceptance is effective at the moment the act is performed.

11. An offer might indicate that the offeree could accept by performing an act by the use of such a phrase as "Ship immediately" or "Procure for me without delay ...".

12. The act by which the offeree can accept in such a case is that act authorized by the offer, established

⁷ No specific rule is given as to when acceptance by silence is effective. See, however, example 2C in which it is concluded that the acceptance was effective at the expiration of the relevant period of time. In at least one legal system the effect of silence is related back to the time when the offer is received by the offeree. Swiss Code of Obligations, art. 10, subs. 2.

practice or usage. In most cases it would be by the shipment of the goods or the payment of the price but it could be any other act, such as the commencement of production, packing the goods, opening of a letter of credit or, as in the second example in paragraph 11 above, the procurement of the goods for the offeror.

13. It should be noted that an offer which permits the offeree to accept by performing an act without notice to the offeror does not constitute a unilateral derogation from the general rule of article 12 (2) that an acceptance is effective only upon notice to the offeror. Since article 12 (3) specifically anticipates the possibility that the offer will authorize acceptance in this manner, it is not necessary that there be a prior agreement between the parties to this effect.

Declaration of non-applicability, paragraph (4)

14. The declaration of non-applicability envisaged by paragraph (4) applies only to acceptance in any form other than in writing. In effect such a declaration would exclude the cases envisaged by article 12 (3) and would limit the operation of article 12 (1) to declarations of assent made in writing. The declaration of non-applicability would also exclude acceptance by silence.

Article 13. Additions or modifications to the offer

(1) A reply to an offer containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 7.

Commentary

General rule, paragraph (1)

1. Article 13 (1) states that a purported acceptance which adds to, limits or otherwise modifies the offer to which it is directed is a rejection of the offer and constitutes a counter-offer.

2. This provision reflects traditional theory that contractual obligations arise out of expressions of mutual agreement. Accordingly, an acceptance must comply exactly with the offer. Should the purported acceptance not agree completely with the offer, there is no acceptance but the making of a counter-offer which requires acceptance by the other party for the formation of a contract.

3. However, the acceptance need not use the exact same words as used in the offer so long as the differences in the wording used in the acceptance would not change the obligations of the parties.

4. Even if the reply makes inquiries or suggests the possibility of additional terms, it may be that it does not fall under article 13 (1). The reply may be considered as

an independent communication intended to explore the willingness of the offeror to accept different terms while leaving open the possibility of later acceptance of the offer.

5. This point is of special importance in the light of article 11 which provides that "an offer, even if it is irrevocable, is terminated when a rejection reaches the offeror".

6. Although the explanation for the rule in article 13 (1) lies in a widely held view of the nature of a contract, the rule also reflects the reality of the common factual situation in which the offeree is in general agreement with the terms of the offer but wishes to negotiate in regard to certain aspects of it. There are, however, other common factual situations in which the traditional rule, as expressed in article 13 (1), does not give desirable results. Article 13 (2) creates an exception to article 13 (1) in regard to one of these situations.

Non-material alterations, paragraph (2)

7. Article 13 (2) contains rules dealing with the situation where a reply to an offer is expressed and intended as an acceptance but contains additional or different terms which do not materially alter the terms of the offer. For example, an offer stating that the offeror has 50 tractors available for sale at a certain price is accepted by a telegram which adds "ship immediately" or "ship draft against bill of lading inspection allowed".

8. In most cases in which a reply purports to be an acceptance any additional or different terms in the reply will not be material and, therefore, under article 13 (2) a contract will be concluded on the basis of the terms in the offer as modified by the terms in the acceptance. If the offeror objects to the terms in the purported acceptance, the reply does not function as an acceptance but falls under article 13 (1). Therefore, if the offeror objects to a reply which adds "ship immediately" on the grounds that, where no delivery date is specified, the seller must deliver the goods "within a reasonable time after the conclusion of the contract",⁸ the reply is a rejection of the offer.

9. In the normal course of events in which the offeror objects to a non-material addition or limitation, the two parties will agree on mutually satisfactory terms without difficulty. However, since the offer was rejected by the addition of the non-material alteration to which the offeror objected, the offeree may no longer accept the original offer.

10. If the reply contains a material alteration, the reply would not constitute an acceptance but would constitute a counter-offer. If the original offeror responds to this reply by shipping the goods or paying the price, a contract may eventually be formed by notice to the original offeree of the shipment or payment. In such a case the terms of the contract would be those of the counter-offer.

Article 14. Time fixed for acceptance

(1) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from

the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of the period for acceptance at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 8 (2).

UNCITRAL Arbitration Rules, article 2 (2).

1. Article 14 (1) provides a mechanism for the calculation of the commencement of the period of time during which an offer can be accepted.

2. If a period of time for acceptance is of a fixed length, such as 10 days, it is important that the point of time at which the 10-day period commences be clear. Therefore, article 14 (1) provides that a period of time for acceptance fixed by an offeror in a telegram "begins to run from the moment the telegram is handed in for dispatch".

3. In the case of a letter the time runs "from the date shown on the letter" unless no such date is shown, in which case it runs "from the date shown on the envelope". This order of preference was chosen for two reasons: first, the offeree may discard the envelope but he will have available the letter as the basis for calculating the end of the period during which the offer can be accepted and second, the offeror will have a copy of the letter with its date but will generally have no record of the date on the envelope. Therefore, if the date on the envelope controlled, the offeror could not know the termination date of the period during which the offer could be accepted.

Article 15. Late acceptance

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or dispatches a notice to that effect.

(2) If the letter or document containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree orally that he considers his offer as having lapsed or dispatches a notice to that effect.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 9.

Commentary

1. Article 15 deals with acceptances that arrive after the expiration of the time for acceptance.

⁸ CISG, article 17 (c).

Power of offeror to consider acceptance as having arrived in due time, paragraph (1)

2. If the acceptance is late, the offer lapses and no contract is concluded by the arrival of the acceptance. However, article 15 (1) provides that the late acceptance becomes an effective acceptance if the offeror without delay informs the acceptor orally or by the dispatch of a notice that he considers the acceptance to be effective.

3. Article 15 (1) differs slightly from the theory found in many countries that a late acceptance functions as a counter-offer. Under this paragraph, as under the theory of counter-offer, a contract is concluded only if the original offeror informs the original offeree of his intention to be bound by the late acceptance. However, under this paragraph it is the late acceptance which becomes the effective acceptance at the moment the original offeror informs the original offeree of his intention either orally or by the dispatch of a notice whereas under the counter-offer theory it is the notice by the original offeror of his intention which becomes the acceptance and this acceptance is effective only upon its arrival.

Acceptances which are late because of a delay in transmission, paragraph (2)

4. A different rule prevails if the letter or document which contains the late acceptance shows that it was sent in such circumstances that, if its transmission had been normal, it would have been communicated in due time. In such case the late acceptance is considered to have arrived in due time, and the contract is concluded as of the moment the acceptance reaches the offeror, unless the offeror without delay notifies the offeree that he considers the offer as having lapsed.

5. Therefore, if the letter or document which contains the late acceptance shows that it was sent in such circumstances that if its transmission had been normal, it would have reached the offeror in due time, the offeror must notify the offeree to prevent a contract from being concluded. If the letter or document does not show such proper dispatch and the offeror wishes the contract to be concluded, he must notify the offeree that he considers the acceptance to be effective.

Article 16. Withdrawal of acceptance

An acceptance is withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 10.

Commentary

Article 16 provides that an acceptance cannot be withdrawn after it has become effective. This provision complements the rule in article 17 that a contract of sale is concluded at the moment the acceptance becomes effective.⁹

⁹ Articles 12 (2) and 12 (3) state when an acceptance becomes effective.

Article 17. Time of conclusion of contract

A contract of sale is concluded at the moment that an acceptance of an offer is effective in accordance with the provisions of this Convention.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

None.

Commentary

1. Article 17 specifically states that which would otherwise have undoubtedly been understood to be the rule, i.e. that the contract is concluded at the moment that an acceptance of an offer is effective in accordance with the provisions of this Convention. It was thought desirable to state this rule explicitly because of the large number of rules in this Convention and CISG which depend on the time of the conclusion of the contract.

2. On the other hand article 17 does not state an express rule for the place at which the contract is concluded. Such a provision is unnecessary since no provision of this Convention or of CISG depend upon the place at which the contract is concluded. Furthermore, the consequences in regard to conflicts of law and judicial jurisdiction which might arise from fixing the place at which the contract is concluded are uncertain and might be unfortunate. However, the fact that article 17, in conjunction with article 12, fixes the moment at which the contract is concluded may be interpreted in some legal systems to be determinative of the place at which it is concluded.

Article 18. Modification and rescission of contract

(1) The contract may be modified or rescinded by the mere agreement of the parties.

(2) A written contract which contains a provision requiring any modification or rescission to be in writing may not be otherwise modified or rescinded. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

(3) This article does not apply to the modification or rescission of a contract in so far as it is allowed otherwise than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

UNCITRAL Arbitration Rules, articles 1 and 30.

Commentary

1. This article governs the modification and rescission of a contract.

General rule, paragraph (1)

2. Paragraph (1), which states the general rule that a contract may be modified or rescinded merely by agreement of the parties, is intended to eliminate an important difference between the civil law and the com-

mon law in respect of the modification of existing contracts. In the civil law an agreement between the parties to modify the contract is effective if there is sufficient *cause* even if the modification relates to the obligations of only one of the parties. In the common law a modification of the obligations of only one of the parties is in principle not effective because "consideration" is lacking.

3. Many of the modifications envisaged by this provision are technical modifications in specifications, delivery dates, or the like which frequently arise in the course of performance of commercial contracts. Even if such modifications of the contract may increase the costs of one party, or decrease the value of the contract to the other, the parties may agree that there will be no change in the price. Such agreements according to article 18 (1) are effective, thereby overcoming the common law rule that "consideration" is required.

4. In addition, article 18 (1) is applicable to the question as to whether the terms in a confirmation form or in an invoice sent by one party to the other after the conclusion of the contract modify the contract where those terms are additional or different from the terms of the contract as it was concluded. If it is found that the parties have agreed to the additional or different terms, article 18 (1) provides that they become part of the contract. As to whether the silence on the part of the recipient amounts to an agreement to the modification of the contract, see articles 2 (2) and 12 (1) and the commentaries to those articles.

5. A proposal to modify the terms of an existing contract by including additional or different terms in a confirmation or invoice should be distinguished from a reply to an offer which purports to be an acceptance but which contains additional or different terms. This latter situation is governed by article 13.

Modification or rescission of a written contract, paragraph (2)

6. Although article 3 of this Convention and article 11 of CISG provide that a contract need not be in writing, the parties can reintroduce such a requirement. A similar problem is the extent to which a contract which specifically excludes modification or rescission unless in writing, can be modified or rescinded orally.

7. In some legal systems a contract can be modified orally in spite of a provision to the contrary in the contract itself. It is possible that such a result would follow from article 3 which provides that a contract governed by this Convention need not be evidenced by writing. However, article 18 (2) provides that a written contract which excludes any modification or rescission unless in writing cannot be otherwise modified or rescinded.

8. In some cases a party might act in such a way that it would not be appropriate to allow him to assert such a provision against the other party. Therefore, article 18 (2) goes on to state that to the extent the other party has relied on such conduct, the first party cannot assert the provision.

9. It should be noted that the party who wishes to assert the provision in the contract which requires any modification or rescission to be in writing is precluded from doing so only to the extent that the other party has

relied on the conduct of the first party. This may mean in a given case that the terms of the original contract may be reinstated once the first party denies the validity of the non-written modification.

Example 18A: A written contract for the sale to A over a two-year period of time of goods to be manufactured by B provided that all modifications or rescissions of the contract had to be in writing. Soon after B delivered the first shipment of goods to A, A's contracting officer told B to make a slight modification in the design of the goods. If this modification was not made, he would instruct his personnel to reject future shipments and not to pay for them. Even though B did not receive written confirmation of these instructions, he did modify the design as requested. The next five monthly deliveries were accepted by A but the sixth was rejected as not conforming to the written contract. In this case A must accept all goods manufactured according to the modified design but B must reinstate the original design for the remainder of the contract.

Declaration of non-applicability, paragraph (3)

10. For the effect of paragraph (3), see the commentary to article (X).

Article (X). Declarations

A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may at the time of signature, ratification or accession make a declaration to the effect that the provisions of this Convention, in so far as they allow the conclusion, modification or rescission of the contract, offer, acceptance or any other indication of intention to be made otherwise than in writing shall not apply if one of the parties has his place of business in the declarant State.

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

CISG, article (X).

Commentary

1. This convention gives effect to an offer, the acceptance of an offer or the modification or rescission of a contract made orally or evidenced by conduct or even, in certain cases, by silence. These rules are similar to those in force in the majority of legal systems.

2. However, in some legal systems the requirement of a writing for the conclusion, modification or rescission of a contract is considered to be of vital importance. Therefore, article (X) permits a Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing to make a declaration to the effect that those provisions of this convention which allow the conclusion, modification or rescission of the contract other than in writing do not apply if one of the parties has his place of business in the declarant State.

3. Article (X) is supplemented by a separate paragraph in the affected articles, i.e. articles 3, 7, 12 and 18. This separate paragraph specifies the effect which the declaration made under article (X) would have on the application of that article. The last sentence of each of these separate paragraphs makes it clear that

the individual parties to the transaction may not by their private agreement under article 2 (2) derogate from the effect of such a declaration.

4. A declaration under article (X) does not reverse the rule in the affected articles and create a requirement under this convention that the contract be concluded,

modified or rescinded in or evidenced by writing. Instead, it has the effect of eliminating from this convention any rule on the requirement of a written form, leaving the determination of the issue to the applicable national law as determined by the rules of private international law of the forum.

E. Report of the Secretary-General: Incorporation of the provisions of the draft Convention on the Formation of Contracts for the International Sale of Goods into the draft Convention on the International Sale of Goods (A/CN.9/145)*

I. INTRODUCTION

1. At its tenth session the United Nations Commission on International Trade Law deferred until its eleventh session the question whether the rules on formation and validity of contracts for the international sale of goods should be the subject-matter of a convention separate from the Convention on the International Sale of Goods.¹ Subsequently, at its ninth session the Commission's Working Group on the International Sale of Goods completed its work on the preparation of rules on the formation and validity of contracts. The Working Group noted that it had prepared those rules in the form of a separate convention. Therefore, in order to assist the Commission in its decision, the Working Group requested the Secretariat to make a study of the drafting problems which the incorporation of the rules on formation and validity of contracts into the draft Convention on the International Sale of Goods would entail.² This report is submitted in response to that request.

2. Part II of this report examines drafting problems that would arise from an integration of the specific rules of each draft Convention.

3. Part III of this report contains draft final clauses which would enable a State to ratify the provisions on formation, the provisions on sale or both.

4. Part IV contains a suggested lay-out of the composite text including, when appropriate, amended titles.

5. This report shows that there are no insuperable technical problems to combining the texts into a single Convention if the Commission should wish to make such a decision.

II. DRAFTING PROBLEMS IN RELATION TO INTEGRATION OF SUBSTANTIVE RULES

6. The lay-out for a composite Convention, which is suggested in Part IV of this Convention, would have seven chapters as follows:

- Chapter I. Sphere of application
- Chapter II. General provisions
- Chapter III. Formation of contracts
- Chapter IV. Obligations of the seller

- Chapter V. Obligations of the buyer
- Chapter VI. Provisions common to the obligations of the seller and of the buyer
- Chapter VII. Passing of the risk

7. In respect of each provision discussed in the report a suggestion will be made as to whether it should be placed in the chapter on sphere of application (chap. I), the chapter on general provisions (chap. II) or in one of the chapters relevant only to formation of the contract (chap. III) or only to sales (chaps. IV to VII). At paragraph 70 there is a chart showing the suggested arrangement of all the articles of the composite Convention.

Rules on scope of application

8. The rules on scope of application of the draft conventions are contained in article 1 of the draft Convention on the Formation of Contracts for the International Sale of Goods (cited as *Formation*)³ and in articles 1, 2, 3, 5 and 6 of the draft Convention on the International Sale of Goods (cited as *CISG*).⁴

Formation article 1 (1); CISG article 1 (1)

9. The differences between the two texts are as follows:

<i>Formation</i>	<i>CISG</i>
"to the formation of contracts"	"to contracts"
"between parties"	"entered into by parties"

10. The rule in both texts is the same. The two texts could be combined as follows:

"This Convention applies to the formation of contracts of sale of goods between parties, and to contracts of sale of goods entered into by parties, whose places of business are in different States:

- "(a) . . .
- "(b) . . ."

Formation article 1 (1); CISG article 1 (1)

11. If the Commission should decide to adopt the suggestion made in paragraph 67 of this report that a State, if it so chose, should be able to ratify only the rules on formation of contracts or only the rules on contracts of sale, a means would have to be devised to

* 29 March 1978.

¹ *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17)*, para. 33 (Yearbook . . . 1977, part one, II, A).

² Report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977), A/CN.9/142, para. 303 (reproduced in the present volume, part two, I, A).

³ The text of the draft Convention as approved by the Working Group on the International Sale of Goods at its ninth session is found in A/CN.9/142/Add.1 (reproduced in the present volume, part two, I, A, annex).

⁴ The text of the draft Convention as approved by the Commission at its tenth session is found in A/32/17, para. 35 (Yearbook . . . 1977, part one, II, A).

assure that a contracting State is not considered to be a contracting State in respect of the substantive rules it has not ratified. For the suggested solution to this problem, see proposed article (Y) (1), set out in paragraph 68 below.

Formation article 1 (2); CISG article 1 (2)

12. The difference between the two texts is as follows:

<i>Formation</i>	<i>CISG</i>
"either from the offer, any reply to the offer"	"either from the contract"

13. In both texts the fact that the parties have their places of business in different States is to be disregarded if that fact does not appear by the time the contract is concluded. It would appear that the text used in Formation would be appropriate for a composite text. Alternatively, the two texts could be combined so as to include all of the words currently used in both texts as follows:

"The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the offer, any reply to the offer, the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract."

Formation article 1 (3); CISG article 1 (3)

14. The difference between the two texts is as follows:

<i>Formation</i>	<i>CISG</i>
"or of the proposed contract"	"or of the contract"

15. The rule in both texts is the same. The two texts could be combined as follows:

"Neither the nationality of the parties nor the civil or commercial character of the parties or of the proposed contract or of the contract itself is to be taken into consideration."

Formation article 1 (4); CISG article 2

16. The difference between the two texts in the opening line is as follows:

<i>Formation</i>	<i>CISG</i>
"to the formation of contracts"	"to sales"

17. The rule in this portion of both texts is the same. The two texts could be combined as follows:

"This Convention does not apply to the formation of contracts of sale or to sales."

Formation article 1 (4) (a) CISG article 2 (a)

18. The difference between the two texts is as follows:

<i>Formation</i>	<i>CISG</i>
"at any time before or at the conclusion of the contract"	"at the time of the conclusion of the contract"

19. The rule in the two texts appears to be the same since a seller who had the requisite knowledge before the conclusion of the contract "ought to have known"

of it at the time of the conclusion of the contract, which is the relevant time under CISG. Therefore, it would appear to be appropriate for the composite text to use the Formation text.

Formation article 1 (5); CISG article 3 (1)

20. The difference between the two texts is as follows:

<i>Formation</i>	<i>CISG</i>
"to the formation of contracts"	"to contracts"

21. The rule in both texts is the same. The two texts could be combined as follows:

"This Convention does not apply to the formation of contracts or to contracts where the preponderant part of the obligation of the seller consists in the supply of labour or other services."

Formation article 1 (6); CISG article 3 (2)

22. The difference between the two texts is as follows:

<i>Formation</i>	<i>CISG</i>
"The formation of contracts . . . is to be considered as the formation of contracts of sale of goods"	"Contracts for . . . are to be considered sales"

23. The rule in the two texts is the same. Simple cumulation of the opening portion of the two texts is awkward. However, the two texts could be combined as follows:

"The formation of contracts for the supply of goods to be manufactured or produced and contracts for such supply are to be considered as the formation of contracts of sale or as sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production."

Formation article 1 (7); CISG article 5 (a)

24. The differences between the two texts are as follows:

<i>Formation</i>	<i>CISG</i>
"to the proposed contract and its performance"	"to the contract and its performance"
"at any time before or at the conclusion of the contract"	"at the time of the conclusion of the contract"

25. As to the first difference, there would appear to be no difficulty in cumulating the two phrases.

26. As to the second difference, for the reasons set out in paragraph 19 above, the composite text could use the Formation text.

27. Therefore, the two texts could be combined as follows:

"For the purposes of this Convention:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the proposed contract and its performance or to the contract and its performance having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

Usages and practices which the parties have established between themselves, Formation articles 2, 4 and 6; CISG article 7

28. Although the two Conventions have almost identical rules in respect of usages and practices which the parties have established between themselves, the presentation is sufficiently different to cause difficulties in combining the two texts.

29. Article 7 of CISG is a substantive provision. It states that the parties are bound by usages to which they have agreed (art. 7 (1)) and are considered to have made certain other usages applicable to their contract (art. 7 (2)). Since the usages referred to in article 7 are imported into the contract, any such usage would have the effect of derogating from or varying the effect of any relevant provision of CISG under the terms of article 4.

30. The same result occurs in Formation but by a slightly different technique. In article 2 (2) it is stated directly that the parties may agree to derogate from or vary the effect of any of the provisions of the Convention "as may appear identical to those used in article 7 (2) of CISG to describe those usages which the parties are considered to have made applicable to their contract."

31. In addition, article 4 (3) of Formation, which states rules for interpretation of the acts of the parties, also uses the word "usage" as it is defined in article 6.

32. In a text which combined the provisions of Formation and CISG "usages", as defined, would:

Bind the parties to their terms (art. 7 of CISG and, implicitly, art. 2 (2) of Formation) and, therefore

Derogate from or vary the effect of the provisions of the Convention (art. 2 (2) of Formation and, implicitly, art. 4 of CISG), and

Provide a basis for interpreting the acts of the parties (art. 4 (3) of Formation).

33. It would seem, therefore, preferable to combine the drafting style used in Formation, which relies on a definition, with the drafting style used in CISG, which states a positive rule. Such a text might read as follows:

"(1) Unless otherwise expressly provided in this Convention, usage means any practice or method of dealing of which the parties knew or ought to have known and which in international trade is widely known to and regularly observed by parties to contracts of the type involved in the particular trade concerned.

"(2) The parties to a contract of sale are considered, unless otherwise agreed, to have impliedly made applicable to their contract any usage within the definition contained in the preceding paragraph.

"(3) The parties to a contract of sale are bound by any usage to which they have agreed and by any practices which they have established between themselves."

*Autonomy of the parties, Formation article 2;
CISG articles 4 and 7*

34. The rules in the two Conventions in respect of the autonomy of the parties are substantively almost identical. However, because CISG provides rules in respect of a contract which has been concluded

whereas Formation provides rules for the formation of that contract, there are some differences in substance as well as differences in presentation.

35. (a) Article 2 of Formation provides that the parties may "agree to" exclude, derogate from or vary the Convention. Article 4 of CISG does not use the words "agree to". However, it is understood that an agreement is necessary.

36. (b) As noted in paragraph 29 above, article 7 of CISG explicitly states that certain usages are binding on the parties. There is no such explicit statement in Formation. However, it is implicit in article 2 (2) of Formation that such a rule exists.

37. Similarly, article 2 (2) of Formation explicitly states that the provisions of that Convention may be derogated from or varied by, *inter alia*, usages. There is no such explicit statement in CISG. However, it is implicit in articles 4 and 7 that such a rule exists.

38. (c) Article 2 (2) of Formation provides that the agreement of the parties to derogate from or to vary the effect of a provision in the Convention may appear "from the negotiations, the offer or reply, the practices which the parties have established between themselves or from usages". Some legal systems may find it difficult to apply the same rule in respect of the completed contract of sale since such a rule would require a tribunal to resort to the negotiations between the parties to find an agreement which did not appear in the contract itself.

39. Therefore, it may be preferable to have two separate provisions on the autonomy of the parties, one governing formation and the other governing sales. This could be done by adopting an article such as the following. This article could be placed in chapter I on the sphere of application:

"(1) The parties may agree to exclude the application of this Convention and, unless the Convention provides otherwise, may agree to derogate from or vary any of its provisions.

"(2) The agreement to exclude the provisions of chapter III of this Convention or to derogate from or vary the effect of any of its provisions may appear from the negotiations, the offer, the reply, the practices which the parties have established between themselves or from usages."

Form, Formation article 3; CISG article 11

40. There would be no difficult problems of drafting in combining the two texts into a single text.

41. The text of paragraph (1) of the two articles is identical. The first sentence of article 3 (2) of Formation is identical to article 11 (2) of CISG. The second sentence of article 3 (2) of Formation does not appear in CISG. It would appear appropriate to include it in a combined text.

42. Article (X) to which article 3 (2) of Formation and article 11 (2) of CISG refer is not identical in the two Conventions. No redraft is here provided since the redrafting would need to be done in the context of the final version of Formation.

43. In this report it is suggested that the composite text be placed in chapter II, the chapter dealing with general principles, rather than in chapter III, the chap-

ter dealing with formation of the contract. Although it would be more logical from a substantive point of view for this provision to be in chapter III, placing it in chapter II has the advantage that the provision would have effect within a State which ratified the Convention only in respect of either formation of contracts (chaps. I, II and III) or the substantive law of sales (chaps. I, II, IV, V, VI and VII).⁵ This would leave the substantive situation as it currently exists.

Silence as acceptance, Formation article 2 (3)

44. Article 2 (3) of Formation provides that unless the parties have agreed otherwise, a term of the offer stipulating that silence shall not amount to acceptance is ineffective. This provision should be placed in chapter III of Formation as it deals only with rules on formation.

Interpretation, Formation article 4

45. Article 4 of Formation contains rules relating to the interpretation of communications, statements and declarations by and conduct of a party. CISG does not contain a similar provision.

46. In combining the two texts this provision should be placed only in the chapter on Formation and it should begin "For the purposes of this chapter ...".

Fair dealing and good faith, Formation article 5

47. Article 5 of Formation contains rules relating to fair dealing and good faith in the formation of a contract. CISG does not contain a similar provision.

48. In combining the two texts this provision should be placed only in the chapter on Formation.

*Transmission of communications, Formation article 7;
CISG article 10*

49. The general rule in CISG, set forth in article 10, is that a communication is effective upon dispatch if it was given by means appropriate in the circumstances. However, articles 29 (2), 30 (4), 45 (2), 47 (1), 47 (2) and 51 (4) provide that the communication in question must be "received" to be effective.⁶

50. The general rule in Formation is that a communication is effective when it "reaches" the addressee. However, a special rule exists in article 15 (2).

51. In order to combine the two texts it would be easiest to follow the pattern found in article 10 of CISG, that unless otherwise expressly provided in this Convention, communications which have been sent by means appropriate in the circumstances are effective upon dispatch. The exceptions to this rule would constitute all those provisions in CISG which currently provide for the receipt rule as well as all communications in Formation, including that in article 15 (2). The communication in article 15 (2) of Formation would constitute an exception to article 10 of CISG since it states its own rule in respect of its effectiveness, a rule which could not easily be absorbed into article 10 of CISG.

⁵ See paras. 60-67 below.

⁶ The French text of article 47 (1) omits the notion of "receipt". This is undoubtedly an error in translation which should be corrected.

52. For those provisions which follow the receipt rule, it would be desirable to use the same word throughout the composite Convention, i.e. to use either the word "receipt" or the word "reaches". Depending on which word was chosen, some consequential redrafting of the various articles might be necessary for grammatical reasons.

53. It would also be desirable that the definition of when a communication "reaches" the addressee in article 7 of Formation apply to when a communication is "received" in CISG. It should be noted that article 7 of Formation was modelled on article 2 (2) of the UNCITRAL Arbitration Rules.

54. Therefore, a composite text to be placed in chapter II incorporating article 10 of CISG and article 7 of Formation might read as follows:

"(1) Unless otherwise expressly provided in this Convention, if any communication is given by a party in accordance with this Convention and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

"(2) For the purposes of this Convention, any communication 'reaches' the addressee [or is 'received' by him] when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

"(3) Paragraphs (1) and (2) of this article do not apply to communications made in any other form than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

*Limitation of scope of application of Convention,
CISG article 6*

55. Article 6 of CISG should remain in chapter I on the scope of application. However, it should be amended to indicate that chapters II and III are concerned with the formation of the contract. If this is done, the words "except as otherwise expressly provided therein" could be deleted from the current text of article 6 of CISG. A redrafted text might read as follows:

"This Convention governs only the rights and obligations of the seller and the buyer arising from a contract of sale. In particular this Convention is not concerned with:

"(a) The validity of the contract or of any of its provisions or of any usage;

"(b) The effect which the contract may have on the property in the goods sold; or

"(c) Except as provided in chapters II and III, the formation of the contract."

Rule on specific performance

56. Article 12 of CISG provides that if in accordance with the provisions of the Convention, one party is entitled to require performance of any obligation by the

other party, a Court is not bound to enter a judgement for specific performance unless the Court could do so under its own law in respect of similar contracts of sale not governed by this Convention.

57. This article could be left in chapter II on the general provisions.

Rules on interpretation of the Convention

58. Article 13 of CISG provides that in the interpretation and application of the provisions of the Convention, regard is to be had to its international character and to the need to promote uniformity. Formation does not contain a similar provision. However, there do not appear to be any reasons of policy why it should not.

59. In order for this provision to apply to the entire Convention, it should be located in the proposed chapter II (General provisions).

III. DISCUSSION ON FINAL CLAUSES OF COMPOSITE TEXT

60. If separate conventions for Formation and CISG are prepared, States would have the option to:

- (i) Ratify both texts, i.e. Formation and CISG; or
- (ii) Ratify one text only, i.e. Formation or CISG.

A composite Convention prepared on the basis of no changes of substance must accordingly leave these options unchanged.⁷

Possible techniques in a composite text to preserve the right to ratify Formation or CISG or both

61. The simplest method of enabling separate ratification of Formation or CISG even though they are in a composite text is to place the substantive rules contained in Formation and CISG in separate chapters of the composite Convention and to permit ratification of either the entire Convention or ratification of the Convention with the exception of either the chapter containing the substantive rules of Formation or the chapters containing the substantive rules of CISG.

62. Article 17 (1) of the Vienna Convention on the Law of Treaties recognizes this practice if the treaty so permits or the other Contracting States so agree. As noted in the commentary adopted by the International Law Commission at its eighteenth session on the equivalent draft provision: "Some treaties expressly authorize States to consent to a part or parts only of the treaty or to exclude certain parts, and then, of course, partial ratification, acceptance, approval or accession is admissible."⁸

63. One example of this approach is contained in the Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention) done at Geneva on 15 January 1959.⁹ Article 45 (1) of this Convention provides:

"Any country may declare at the time of signing, ratifying, or acceding to this Convention, or notify the Secretary-General of the United Nations after becoming a Contracting Party to the Convention,

that it does not consider itself bound by the provisions of chapter IV¹⁰ of the Convention; notifications addressed to the Secretary-General shall take effect on the ninetieth day after their receipt by the Secretary-General."

64. A second technique to enable separate adoption in a composite text would be to place the rules presently contained in Formation in one annex and to place the rules presently contained in CISG in another annex. The final clauses would then enable a State to ratify the Convention together with either or both annexes.

65. The Convention on the Privileges and Immunities of the Specialized Agencies approved by the General Assembly of the United Nations on 21 November 1947¹¹ is an example of this approach.

Suggested technique for composite Convention

66. The technique of separate annexes would appear to be more suited to cases where the convention contains the basic or central rules and the annexes contain allied rules, usually of a technical nature, than it would be to a convention on the formation of contracts and on the sale of goods.

67. On the other hand, the rules on formation and the rules on sales could conveniently be contained in separate chapters of the Convention. The final clauses could enable ratification or accession in respect of the chapters concerned or later acceptance of the chapter or chapters not covered by the original ratification or accession. The final clauses can make similar provision for denunciation of the Convention as a whole or of certain chapters thereof.

Suggested composite final clause on ratification

68. "Article (Y). Ratification and accession

"(1) A Contracting State may declare at the time of the deposit of its instrument of ratification or accession that it will not be bound by the provisions of chapter III of part I of this Convention or that it will not be bound by the provisions of chapters IV to VII of part I of this Convention.

"(2) A Contracting State which has made a declaration under paragraph (1) of this article may withdraw it at any time by a notification addressed to the Secretary-General of the United Nations. Such withdrawal takes effect on the first day of the month following the expiration of six months after its receipt by the Secretary-General of the United Nations.

"(3) A Contracting State may denounce this Convention or either chapter III or chapters IV to VII

¹⁰ The Convention has six chapters, as follows:

Chapter I: Definitions

Chapter II: Scope

Chapter III: Provisions concerning transport in sealed road vehicles or sealed containers

Chapter IV: Provisions concerning transport of heavy or bulky goods

Chapter V: Miscellaneous provisions

Chapter VI: Final provisions

It should be noted that a new TIR Convention, signed at Geneva on 14 November 1975, entered into force on 20 March 1978. The new Convention does not enable exclusion of a chapter. The text of the 1975 Convention is found in United Nations document ECE/TRANS/17.

¹¹ United Nations, *Treaty Series*, vol. 33, p. 261.

⁷ See the terms of reference of this report in para. 1 above.

⁸ Para. (2) of the Commentary on draft article 14, *Official Records of the United Nations Conference on the Law of Treaties*, documents of the Conference, (United Nations publication, Sales No. E.70.V.5).

⁹ United Nations, *Treaty Series*, vol. 348, p. 14.

of part I of this Convention by notifying the Secretary-General of the United Nations to that effect.

"(4) The denunciation shall take effect on the first day of the month following the expiration of twelve months after receipt of the notification by the Secretary-General of the United Nations.

"(5) A Contracting State which makes a declaration in respect of chapter III or chapters IV to VII of part I of this Convention or which has denounced those chapters shall not be considered to be a Contracting State within article 1 (1) of this Convention in respect of matters governed by the chapter or chapters which it has not accepted."

IV. SUGGESTED LAY-OUT FOR A COMPOSITE TEXT

69. Should the Commission decide to recommend the adoption of a composite text it would appear neces-

sary to select an appropriate title for the composite Convention. A possible title might be:

"Convention on Contracts for the International Sale of Goods"

70. The chart below sets out a possible order for the articles of a combined Convention, including their sources. Titles for the seven chapters are set out. With the exception of chapter III, these are the titles of the corresponding chapters in CISG. No titles have been suggested for the individual articles. However, the Working Group on the International Sale of Goods has adopted titles for the individual articles in Formation and these titles might be used for the equivalent articles in a composite Convention. Furthermore, at the request of the Commission at its tenth session, the Secretariat has prepared titles for each article in CISG. These titles are to be inserted in the commentary on that Convention which the Secretariat is to prepare.¹²

¹² A/32/17, annex I, para. 11.

<i>Proposed</i>	<i>CISG</i>	<i>Formation</i>	<i>Paragraphs where discussed</i>
Chapter I	Chapter I		
Sphere of application			
Article 1	Article 1	Articles 1 (1), (2), (3)	9-15
2	2	1 (4)	16-19
3	3	1 (5), (6)	20-23
4	4	2 (1), (2)	34-39
5	5	1 (7)	24-27
6	6		55
Chapter II	Chapter II		
General provisions			
Article 7	Article 7	Article 6	28-33
8	8		
9	9		
10	10	Article 7	49-54
11	11	3	40-43
12	12		56-59
13	13		
Chapter III			
Formation of contracts			
Article 14		Article 2 (3)	44
15		4	45-46
16		5	47-48
17-27		8-18	
Chapter IV	Chapter III		
Obligations of the seller			
Articles 28-48	Articles 14-34		
Chapter V	Chapter IV		
Obligations of the buyer			
Articles 49-61	Articles 35-47		
Chapter VI	Chapter V		
Provisions common to the obligations of the seller and of the buyer			
Articles 62-77	Articles 48-63		
Chapter VII	Chapter VI		
Passing of the risk			
Articles 78-82	Articles 64-68		

F. Report of the Secretary-General: analytical compilation of comments by Governments and international organizations on the draft Convention on the Formation of Contracts for the International Sale of Goods as adopted by the Working Group on the International Sale of Goods and on the draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods prepared by the International Institute for the Unification of Private Law (A/CN.9/146 and Add.1-4)

I. COMMENTS BY AUSTRIA, AUSTRALIA, CZECHOSLOVAKIA, FINLAND, THE FEDERAL REPUBLIC OF GERMANY, GHANA, THE NETHERLANDS, SWEDEN AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, AS WELL AS BY THE ECONOMIC COMMISSION FOR EUROPE, THE ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC, THE CARIBBEAN COMMUNITY, THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, THE INTERNATIONAL CHAMBER OF SHIPPING, THE INTERNATIONAL CIVIL AVIATION ORGANIZATION AND THE CENTRAL OFFICE FOR INTERNATIONAL RAILWAY TRANSPORT (A/CN.9/146)*

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INTRODUCTION

1. The text of the draft Convention on the Formation of Contracts for the International Sale of Goods (hereafter referred to as the draft Convention)¹ adopted by the Working Group on the International Sale of Goods at its ninth session (Geneva, 19-30 September 1977) was transmitted to Governments and interested international organizations for their comments.²

2. The Working Group also requested the Secretary-General to circulate the draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods prepared by the International Institute for the Unification

of Private Law (UNIDROIT) (hereafter referred to as the UNIDROIT draft)³ to Governments and interested international organizations for their comments as to whether any matters in that text which had not been included in the draft Convention should be included.⁴

3. As at 19 April 1978 comments have been received from the following States: Austria, Australia, Czechoslovakia, Finland, Germany, Federal Republic of, Ghana, Netherlands, Sweden and United Kingdom of Great Britain and Northern Ireland.

4. Comments have also been received from the following regional commissions of the United Nations and other international organizations: Economic Commission for Europe (ECE), Economic and Social Commission for Asia and the Pacific (ESCAP), Caribbean Community (CARICOM), Hague Conference on Private International Law, International Chamber of Shipping (ICS), International Civil Aviation Organization (ICAO) and the Central Office for International Railway Transport (OCTI).

5. This report contains an analytical compilation of these comments. Comments received after 19 April will be reproduced in an addendum to this report.

6. In preparing the analytical compilation, general comments on the draft Convention precede comments on the individual provisions of the draft. Comments on the provisions of the draft Convention have been arranged by articles and within each article by paragraphs or subparagraphs or, where appropriate, by subject matter. Where the comments concern the article as a whole, and not a particular paragraph of an article, they are analysed under the heading "article as a whole".

ANALYTICAL COMPILATION OF COMMENTS

A. Comments on the draft Convention as a whole

1. General comments on the draft Convention

7. Australia considers that the Working Group at its ninth session improved the draft Convention in several important respects, particularly by incorporating the concept of acceptance by conduct (art. 12) and by deleting article 7 (3) of the previous draft which dealt with confirmation of a prior contract of sale.⁵

8. Czechoslovakia notes with pleasure that the draft Convention supplies a good basis for preparation

³ The text of the UNIDROIT draft is to be found in document A/CN.9/143 (reproduced in the present volume, part two, I, C).

⁴ A/CN.9/142, para. 305.

⁵ A/CN.9/128, annex I (Yearbook...1977, part two, I, B). The text of this provision was as follows:

"[(3) If a confirmation of a prior contract of sale is sent within a reasonable time after the conclusion of the contract, any additional or different terms in the confirmation (which are not printed) become part of the contract unless they materially alter it, or notification of objection to them is given without delay after receipt of the confirmation. [Printed terms in the confirmation form become part of the contract if they are expressly or impliedly accepted by the other party.]]"

Article 7 of the previous draft has been renumbered as article 13.

* 26 April 1978.

¹ The text of the draft Convention is to be found in document A/CN.9/142/Add.1 (reproduced in the present volume, part two, I, A, annex).

² Report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977), A/CN.9/142, para. 304 (reproduced in the present volume, part two, I, A).

of a definitive draft which may result in uniform rules capable of achieving much wider acceptance than the Hague Uniform Law on Formation of Contracts for the International Sale of Goods of 1964.

9. Finland notes that the draft Convention forms a good basis for further work within UNCITRAL on the preparation of a new Convention.

10. The Federal Republic of Germany welcomes the efforts of UNCITRAL to standardize legislation relating to the international sale of goods also with regard to the formation of contracts of sale. It considers the draft Convention prepared by the Working Group to be a good basis for discussion at the forthcoming UNCITRAL session. It particularly welcomes the compromise on the question of revocability as embodied in article 10.

11. Ghana views the draft Convention as an acceptable framework for a Convention on the formation of international contracts of sale of goods.

12. Sweden welcomes the work currently being carried out within UNCITRAL with a view to framing an international set of rules on the sale of goods which could be more widely accepted by States than the 1964 Hague Conventions. Last year UNCITRAL concluded its work on the revision of the Uniform Law on the International Sale of Goods by adopting a new draft Convention on the International Sale of Goods. Sweden considers it logical that the Commission should pursue its work by taking up the question of formation of contracts for the international sale of goods. The text of the draft Convention which has been drawn up by a working group set up by the Commission provides, in the Swedish Government's view, a suitable basis for the Commission's continued work. Generally speaking, this draft text is based on the same principles as the Uniform Law on the Formation of Contracts for the International Sale of Goods. The compromises between the different systems of contract law reflected in the draft can, to a large extent, be accepted by Sweden.

13. All these respondents indicate that particular problems still exist which are not resolved in the draft in its present form, and suggest appropriate solutions to resolve these problems.⁶

14. The secretariat of CARICOM is in general agreement with the text "even though the usefulness of Article 5 may be questioned".

15. The Legal Bureau of ICAO notes that the draft Convention appears to deal with the subject matter of the formation of contracts for the international sale of goods in a satisfactory manner.

2. Relationship to the draft Convention on the International Sale of Goods

16. The secretariat of CARICOM states that there should be one convention covering not only the rights of contracting parties in international sale of goods but also dealing with formation and validity of contracts for the international sale of goods.

17. Finland notes that it would be of importance that the scope of application of the draft Convention is the same as the scope of application of the draft Con-

vention on the International Sale of Goods. One way of achieving this would be to amalgamate these two draft Conventions but efforts to amalgamate the two drafts should be refrained from if that would render the amalgamated Convention less acceptable to States than the draft Convention on the International Sale of Goods as presently drafted.

18. The Federal Republic of Germany notes that the draft Convention settles only some of the legal issues that may arise in connexion with the international sale of goods, whilst other aspects of this area of law have already been covered by the conventions on the international sale of goods. With a view to establishing a world-wide standardized law on the sale of goods, it is urgently necessary to consider all these projects together and at all costs eliminate any contradictions between them. As far as the draft Convention and the draft Convention on the International Sale of Goods are concerned, it would seem necessary to deal with both projects at one and the same diplomatic conference in order to achieve the greatest possible measure of consistency.

19. Sweden states that the draft Convention on the International Sale of Goods and this draft Convention should be submitted to one conference of plenipotentiaries because it is most important that the various provisions be co-ordinated, especially as regards the scope of application. Sweden also states that it would be desirable for the rules regarding sale and the formation of contracts for sale to be combined in one and the same convention, thus achieving greater clarity and providing further guarantees that the scope of application would be identical. However, should it appear that certain States which would be prepared to accept a future Convention based on the draft Convention on the International Sale of Goods would be unable to accept a convention which also contains rules on formation of contracts, the idea of a single convention should be abandoned. The same applies if a merger would considerably delay the adoption of an international set of rules in this field.

3. Relationship to the UNIDROIT draft

20. Austria regrets that it was not possible to consider the rules on validity contained in the UNIDROIT draft because of the urgent need to obtain agreement on a text on formation to supplement the draft Convention on the International Sale of Goods.

21. The secretariat of CARICOM notes that the parts of the UNIDROIT draft dealing with mistake, fraud and threat should be incorporated into the text adopted by the Working Group on Sales.

22. Finland, Ghana, Sweden and the United Kingdom state that further provisions of the UNIDROIT draft should not be included in the draft Convention.

23. Finland notes that the UNIDROIT draft deals with an area in which unification of national law would seem hard to achieve. The draft as it stands would seem to be less mature for finalizing deliberations. It does not seem necessary to include any of the provisions of the UNIDROIT draft into the draft Convention.

24. Ghana does not consider it desirable to include in the draft Convention any rules of validity and consequently agrees with the decision of the Working Group

⁶ These observations are noted below under the respective articles of the draft Convention.

to exclude from the draft Convention all the matters dealt with in the UNIDROIT draft.

25. Sweden does not think it advisable to examine further the question of rules relating to validity of contracts in this context. It would seem particularly difficult to achieve unification in this area and the existing material (the UNIDROIT draft) does not provide a satisfactory basis for the studies necessary.

26. The United Kingdom emphasizes that it would not wish to see the provisions in the UNIDROIT draft relating to mistake included in the draft Convention as these provisions are unacceptably broad.

27. The Hague Conference notes that it might be useful if the draft Convention contained provisions dealing with the consequences of the violation of the principles of fair dealing and the requirement of acting in good faith (art. 5) along the lines of articles 8 to 11 of the UNIDROIT draft. (See further the comments of the Hague Conference on art. 5 of para. 79 below.)

28. The Legal Bureau of ICAO notes that it would be possible to have a single convention (thus avoiding the present different scope of application provisions) dealing with both formation and validity even though, strictly speaking, the question of the validity of contracts appears to be separate from the question of formation of contracts.

29. The Netherlands, has no objection to the incorporation of rules governing validity, but would urge only the inclusion of articles 9 and 16. Article 9, in particular, would have a useful function similar to article 34 of ULIS, which has not been included in the draft Convention on the International Sale of Goods.⁷

30. OCTI states that it would be advisable to include certain provisions of the UNIDROIT draft regarding the legal consequences of errors, in particular the provisions of article 6 in order to avoid a settlement of this question by means of the national laws.

4. Terminology

The draft Convention

31. ESCAP recommends that, in the English text, the words "he", "his", and "him" which indicate the masculine form be replaced by words which are neutral as to gender. These suggestions are to the following effect:

Article 1(7)(b): replace the words "his habitual residence" by "that party's habitual residence".

Article 3(2), 12(4) and 18(3): replace the words "his place of business" by "a place of business".

Article 4(1): replace the words "his intent" by "that party's intent".

Article 13(2): replace the words "If he does not so object" by "If the offeror does not so object".

Article 15(2): replace the words "he considers his

offer as having lapsed" by "the offer is considered to have lapsed".

The UNIDROIT draft

32. ESCAP recommends that, in the English text, the words "he", "his", "him" and "himself" which indicate the masculine form be replaced by words which are neutral as to gender.⁸

B. Comments on specific provisions of the draft Convention

Article 1

Paragraph (1), subparagraph (b)

33. Czechoslovakia notes that in order to achieve maximum acceptability of the draft Convention it is advisable to admit a possibility of any Contracting State to formulate at the time of signature, ratification or acceptance a reservation to the effect that the provisions of the Convention shall apply to the formation of contracts for the international sale of goods only between parties whose places of business are in different Contracting States. Contracting States should have a possibility to exclude in this way the application of subparagraph (b).

Paragraph (3)

34. The Secretariat of ECE notes that the wording of this paragraph may deserve further attention. The application of the draft Convention should not depend on the nationality of the parties: this is beyond dispute. However, the "character of the parties" as well as that of the proposed contract should be taken into consideration since international sales transactions cannot be effected by individuals who, under their national legislation, lack the capacity to conclude the relevant contract.

Paragraph (4), subparagraph (a)

35. Czechoslovakia proposes that this provision read as follows:

"(a) Of goods bought for personal, family or household use, if the seller, at any time before or at the conclusion of the contract knew or ought to have known that the goods were bought for any such use."

It should thus follow that in case of doubt the Convention applies.

Paragraph (4) subparagraph (e)

36. ICS is pleased to note that contracts for the sale of ships, vessels or aircraft are not within the scope of the draft Convention.

Paragraph 6

37. The Secretariat of ECE notes that this provision is of particular importance because it correctly excludes subcontracting, i.e. all kinds of industrial co-

⁷ Article 34 of the Uniform Law on the International Sale of Goods provides: "In the cases to which article 33 relates, the rights conferred on the buyer by the present Law exclude all other remedies based on lack of conformity of the goods". Article 33 sets out the circumstances where the seller has not fulfilled his obligation to deliver the goods.

⁸ ESCAP notes that this suggestion affects arts. 1(2), 7(2), 9, 11, 14(3), 15(1) and 15(2).

operation contracts from the scope of the draft Convention, leaving the draft Convention to deal with straightforward commercial contracts.

Proposed alternate article 1

38. The United Kingdom proposes the reinstatement of the alternative text of this article as adopted by the Working Group at its eighth session. This was for use by those States which adopted the draft Convention on the International Sale of Goods and provided as follows:

"This Convention applies to the formation of contracts of sale of goods which, if they were concluded, would be governed by the Convention on the International Sale of Goods."⁹

Article 2

Article as a whole

39. ICS is pleased to note that the parties may agree to exclude the application of the Convention or derogate from or vary the effect of any of its provisions.

Unilateral variation or exclusion of Convention

40. Czechoslovakia, the secretariat of ECE, Finland, Sweden and the United Kingdom comment on the question whether one party should be able to unilaterally exclude the application of the draft Convention or vary or derogate from any of its provisions.

41. The secretariat of ECE favours the solution adopted by the Working Group, i.e. that agreement of the parties is necessary to vary or exclude the draft Convention.

42. Czechoslovakia, Finland, Sweden and the United Kingdom are, to varying degrees, opposed to the rule contained in article 2 that the draft Convention may be varied or excluded only by agreement of the parties.

43. Czechoslovakia states that the question of whether derogation from or variation of the provisions of the draft Convention might also be permitted on the basis of a unilateral act of one of the parties should be reconsidered. Czechoslovakia notes that difficulties may arise in connexion with the application of the present article 2, in particular in respect of the complicated question concerning the rules which are to be applied to the agreement on the exclusion or derogation from the provisions of the draft Convention. For instance, example 2A.3 in the commentary¹⁰ may be interpreted in another way, namely, that a part of the offer was a condition requiring written form for the contract. If the other party purported to accept the offer by telephone, this oral form of reply meant modification of the conditions of the offer and could not be considered as an acceptance, taking into consideration article 13 of the draft Convention. The relationship between article 2 and article 13 should be clarified because the conclusion of paragraph 10 of the commentary relating to article 2 is not the only possible solution of the problem. The

same difficulties arise in connexion with other examples used in the commentary.

44. Finland states that under paragraph (1) of this article the parties may agree to exclude the application of the Convention. The wording of the paragraph suggests that the offeror may not unilaterally exclude the application of the Convention. This might prove surprising to parties involved in international sale of goods. It might also be asked what happens if the offer contains a provision according to which the offer is not subject to the Convention, and the offeree does not react in any way. The result would seem to be, that a contract has been entered into according to the provisions of the Convention. It might, however, also be held, that the parties have not reached agreement on this point and that no contract has been made. Further, it might be asked how an agreement such as that envisaged in the paragraph should be made. It might be held that this is not an agreement for the international sale of goods and that the convention would not be applicable to such an agreement. Finland therefore proposes that paragraph (1) of article 2 be deleted and that a second sentence be added to the present paragraph (2) as follows:

"A party is deemed to have accepted the rules in the offer or the reply to be followed in respect of the formation of the contract unless he objects to them without delay."

45. Sweden states that interpreted literally paragraph (1) of this article seems to require an express agreement to exclude application of the draft Convention completely. Sweden states that this requirement seems to be rather strict. Circumstances other than express agreement should also exclude application of the draft Convention in certain cases. For instance, should the parties in their prior relations have applied national rules, they should be regarded as having excluded application of the draft Convention when forming a subsequent contract.

46. The United Kingdom proposes that it should be possible for the draft Convention or any of its provisions to be excluded or varied by the unilateral act of a party, and not only by the agreement of both parties.

Paragraph (1)

47. The Hague Conference notes that this paragraph creates the impression that the right to exclude the draft Convention derives from the draft Convention. However, it might be considered illogical to allow parties to rely on a provision of a convention which they exclude. A further problem is that the formation and validity of the exclusion agreement is not dealt with. These considerations lead to the question whether the provision is really needed.

Paragraph (2)

Derogation from provisions of Convention

48. The Netherlands states that paragraph (2) lays down that in principle the parties may agree to derogate from or vary the effect of the draft Convention's provisions. The commentary points out that such agreement must precede the conclusion of the contract of sale. The following example is given: A orders goods from B, stating that (in derogation from article 3, para. 1, of the

⁹ A/CN.9/128, annex I.

¹⁰ Report of the Secretary-General: commentary on the draft Convention on the Formation of Contracts for the International Sale of Goods (hereafter referred to as commentary), (A/CN.9/144 (reproduced in the present volume, part two, I, D)).

draft Convention) acceptance must be in writing; B accepts by telephone. According to the commentary, the acceptance is effective in spite of any protest which A might make, since the parties had not agreed beforehand to derogate from article 3, paragraph (1).¹¹ The Netherlands has serious objections to this view, because the offeror must have the liberty to determine both the substance of his offer and such other modalities as the duration of its validity, the date on which it is to take effect and the manner in which it is to be accepted. The offeree must not be capable of accepting the offer without accepting these attendant conditions; if the offeree accepts the offer, it must be assumed that he also accepts any deviations from the draft Convention's basic provisions it may contain. The acceptance of an offer can therefore in itself involve deviating from the Convention, and prior acceptance of deviations proposed in the offer should not be demanded. The Netherlands notes that the other example given in the commentary must also be resolved in this manner.¹² If A states in his offer that B's written acceptance becomes effective at the moment it was sent instead of at the moment of receipt, as provided in article 12(2), and B then accepts the offer in writing, the moment of sending should then indeed be decisive. If A has, for example, set a period for acceptance, he cannot argue that the acceptance came too late if it was sent on time but received too late.

49. The Hague Conference states that paragraph (2) is possibly too wide as it gives a large scope to party autonomy although Contracting States may restrict this by virtue of the provisions of articles 3(2) and 7(2). It is noted that Contracting States which avail themselves of these provisions would probably not allow parties to exclude either the whole Convention or the mandatory provisions in those cases where the Convention applies. Similarly, it is noted that States which were of the view that the Convention should not apply to consumer sales (art. 1(4)(a)) may not wish to permit the parties to include consumer sales within the scope of the Convention. Moreover, the parties should not be permitted to waive article 5 of the draft Convention.

50. See also paragraphs 74 to 75 below on the desirability of making article 5 mandatory, paragraphs 121 to 125 below on the desirability of being able to derogate from article 18(2) and paragraphs 128 to 130 below on the operation of article (X).

Factors establishing agreement to derogate from provisions of Convention

51. Australia notes that as the words "agree to" have been retained in paragraph (2), the references to "offer" and "reply" seem to need modifying. An offer—and often also a reply—does not of itself manifest an agreement. The drafting would therefore be improved by substituting "the negotiations, including offer and reply" for "the negotiations, the offer or the reply".

52. Czechoslovakia notes that should the principle of an agreement be accepted as the basis for derogation from or exclusion of the draft Convention, "usages" mentioned at the end of paragraph (2) should be deleted

as mere usages cannot be considered to constitute an agreement between the parties. In any case, it is doubtful whether any usages apply in international trade in connexion with general questions concerning formation of contracts to which the scope of the draft Convention is limited.

53. The Netherlands objects to the wording of paragraph (2) which states that agreement "may appear from the negotiations, the offer or the reply, from the practices which the parties have established between themselves or from usage". Agreement cannot be apparent from an order alone, but only from the order and the reply taken together. Finally, the summary appears too limited: agreement can also be apparent from legal transactions other than offer and reply, such as an earlier agreement or a company's articles of association. Such transactions will sometimes but not always be covered by the expression "practices which the parties have established between themselves".

Paragraph (3)

54. ESCAP notes that, in the interest of prudent business practice, there are some matters to which undue attention should not be drawn or which should not be encouraged. One of these is the practice of acceptance of offers by remaining silent. However, article 2(3) stresses that a term of the offer stipulating that silence shall amount to acceptance is not effective unless the parties have previously agreed otherwise. ESCAP considers that article 12(1) would provide sufficient coverage of the point in question, i.e., "Silence shall not in itself amount to acceptance" without belabouring the point of the possibility that the parties might previously agree otherwise.

55. The Netherlands notes that paragraph (3) lays down that "a term of the offer stipulating that silence shall amount to acceptance is not effective, unless the parties have previously agreed otherwise"; the wording of this exception is too restrictive: practices customary between the parties and usage can also lead to the other party being bound by silence and allow the offeror to stipulate this in his offer. Strikingly, article 12, paragraph (1), also includes a regulation to the effect that silence in itself does not amount to the acceptance of an offer. Perhaps the outcome advocated above can be achieved with the help of the latter regulation. However, the relationship between the two regulations is unclear, and it would be better to cover the matter of acceptance by silence in a single provision.

Article 3

Paragraph (2)

56. Austria regrets the existence of this provision because the substantive rule in article 3(1) is contained in article 11 of the draft Convention on the International Sale of Goods. Furthermore, the possibility of making a reservation may affect the trust in the validity of agreements made by parties whose places of business are in States where article 3(1) is applicable and those parties do not know whether the other Contracting State has made a reservation under paragraph (2).

57. Australia has no strong objections to this provision but proposes an amendment to article (X) to pre-

¹¹ Commentary A/CN.9/144, example 2A.3.

¹² *Ibid.*, example 2A.4.

vent that provision from operating unfairly (see the observations of Australia on article (X) at para. 128 below).

58. The comments of the Federal Republic of Germany on article (X) at paragraph 130 below refer to this provision.

Article 4

Scope of article

59. Sweden notes that it appears from the commentary that the interpretation rule in this article only relates to questions connected with the formation of the contract. No rules regarding the interpretation of contracts already concluded are contained either in this Convention or in the draft Convention on the International Sale of Goods (except that relevance of usage is stressed). Should article 4 be accepted, the result would therefore be that the law on international sale would have to distinguish between the interpretation of communications at the time of the formation of the contract and interpretation of the contract itself. It is doubtful whether a distinction of this kind can really be made. In any event, it would seem to be very difficult and there is a risk that the interpretation rule in article 4 would also be applied to the contract as such. Sweden therefore suggests that article 4 be deleted. Sweden makes an alternate proposal which is discussed under "Nature of test for determining intent" below.

Nature of test for determining intent

60. Finland, Sweden and the United Kingdom note that this article, as presently drafted, places too much emphasis on the subjective intent of one of the parties where the other party knew or ought to have known what that intent was, i.e. the rule in paragraph (1).

61. Finland proposes that the order of the paragraphs should be altered to (2), (3) and (1). Finland also proposes that the expression "ought to have known" in the present paragraph (1) be replaced by the expression "could not have been unaware of".

62. Sweden suggests first and foremost that article 4 be deleted (see para. 59 above). Alternatively, Sweden proposes that the subjective interpretation rule referred to in this article should be modified and made more objective. The expression "ought to have known" might, for instance, be replaced by "must have known".

63. The United Kingdom states that it would be preferable to start with the objective approach laid down in paragraphs (2) and (3) and to make that subject to exceptions where account would be taken of a person's actual intent.

Article 5

Article as a whole

64. The Netherlands is pleased to see the inclusion in article 5 of a rule concerning good faith, and would welcome a similar provision in the draft Convention on the International Sale of Goods.

65. Austria notes that the article could eventually be dispensed with although there are no objections to maintaining it in its present formulation.

66. The secretariat of CARICOM questions the usefulness of this provision.

67. Finland and Sweden propose that article 5 be deleted or reformulated to indicate the consequences of a party breaching its provisions. The proposals of Finland and Sweden relating to reformulation of the article are set out below at paragraphs 77 and 78.

68. Australia proposes the deletion of article 5 if it is not possible to define more specifically the concepts of fair dealing and good faith (see the observations of Australia at para. 70 below).

69. The United Kingdom considers that it is undesirable to include in the draft Convention a provision which is so vague and unclear in its effect as this article is.

The concepts of fair dealing and good faith

70. Australia notes that although the principles of good faith and fair dealing are highly desirable principles in international commerce it considers that these concepts are so broad and lacking in precision that they will give rise to widely differing interpretations in the courts of different countries. The article is likely therefore to give rise to uncertainty in the application of the Convention, and to excessive litigation. It is noted that no corresponding provision exists in the draft Convention on the International Sale of Goods to which this draft Convention is in fact subsidiary. For these reasons, Australia prefers that the concepts be re-drafted in a much more specific fashion. If this is not possible, Australia proposes that the article be deleted.

71. The Hague Conference notes that article 5 may be considered to encompass cases where a party was induced to conclude a contract because of the fraud of the other party (art. 10 of the UNIDROIT draft) or because of an unjustifiable, imminent and serious threat (art. 11 of the UNIDROIT draft). However, it is doubtful whether the provisions of the UNIDROIT draft dealing with mistake are encompassed by article 5.

72. The Netherlands notes that while it is true that such vague concepts as "good faith" and "principles of fair dealing" may cause some uncertainty in the legal application of the draft Convention, this drawback is more than outweighed by the advantage that they enable fairer results to be achieved. The following point should nonetheless be noted. It is common knowledge that different legal systems accord very different functions to "good faith": sometimes it has only the effect of supplementing the rules of law governing relations between the parties. In other systems, "good faith" has a derogatory effect, and can therefore set aside the rules prevailing between the parties as a result of the contract. A distinction is conceivable in systems of the latter kind: the "good faith" concept may be allowed only to limit what has been agreed between the parties; on the other hand it may permit departures from custom, from non-peremptory law or even from peremptory law. Certain legal systems recognize the competence of the court to amend or dissolve contracts on grounds of "good faith". On the basis of "good faith", it is possible to declare unenforceable contracts not entered into freely (e.g. under coercion) or unwittingly entered into because of some mistake, misunderstanding or deceit; this is interesting, in view of the fact that the draft Convention contains no rules concerning the validity of the contracts of sale.

73. The Netherlands also notes that considering the theoretically very broad applicability of the "good faith" concept mentioned in article 5 (or as might be included in the draft Convention on the International Sale of Goods), the question arises as to the desirability of precisely delimiting the concept's sphere of application. If this is not done, it is to be feared that its interpretation will vary greatly from country to country, especially since the present draft Convention lacks a provision on the lines of article 13 of the draft Convention on the International Sale of Goods.¹³

Mandatory nature of article 5

74. Czechoslovakia notes that the mandatory character of this article follows only from using the expression "must".

75. Czechoslovakia and the Hague Conference are of the view that the parties should not be permitted to waive or derogate from this provision. Czechoslovakia proposes that the following sentence be added to article 5:

"The parties may not derogate from or vary the effect of this article."

Consequences of failure to comply with article 5

76. Finland, Sweden and the Hague Conference comment on the fact that the draft Convention does not deal with the consequences of a party's failure to comply with article 5.

77. Finland notes that the article as drafted seems to contain only a declaration of principle to which no consequences have been attached. If a party is not in good faith concerning a matter of relevance, a rule stating that he must observe the principles of fair dealing and act in good faith would seem to make national law on the consequences of the lack of good faith applicable. No unification would thus be achieved. Finland proposes that the provision be either deleted or reformulated by substituting the word "principles" by the word "requirements" and attaching a provision on the consequences. It might, however, be asked whether such a redrafted provision should not be placed in a future convention on validity of contracts.

78. Sweden states that there is no objection to the principle embodied in this article. However, the article does not include any provisions regarding the consequences for someone who acts in a manner that does not conform to that indicated. The provision is therefore devoid of any real substance and thus is hardly likely to contribute to unification in this matter. Sweden suggests that this article should be deleted from the draft Convention. On the other hand, an article of this kind specifying the consequences referred to above might suitably be incorporated in a possible convention on the validity of contracts.

79. The Hague Conference notes that although this provision does not indicate the consequences if a party

violates its principles, the UNIDROIT draft in dealing with cases of fraud and threat gives the injured party the right to avoid the contract. However, under the draft Convention it is not clear whether the sanction is nullity or merely that violation is a ground for annulment. The Hague Conference notes that this latter alternative creates a period of uncertainty which would only be terminated when annulment was requested. The Hague Conference concludes that failure to provide for the consequences of a breach of article 5 leaves a more or less serious gap in the text and accordingly suggests that it might be preferable to include a provision in the draft Convention which sets out the consequences of a violation of article 5.

Article 7

Paragraph (2)

80. Australia has no strong objections to this provision but proposes an amendment to article (X) to prevent that provision from operating unfairly (see the observations of Australia on article (X) at para. 178 below).

81. The comments of the Federal Republic of Germany on article (X) at paragraph 130 below refer to this provision.

Article 8

Article as a whole

82. Finland states that paragraph (3) contains an additional explanation to paragraph (1) and accordingly Finland suggests that the paragraphs be presented in the order (1), (3) and (2).

Paragraph 2

Public offers

83. Finland notes that under paragraph (2) so-called public offers are to be considered as offers under the draft Convention if it is clearly indicated that they are intended to be regarded as such. This provision is in itself acceptable. However, it might cause difficulties in connexion with article 10 as the offeror cannot know whom such an offer has reached. It might thus be impossible to revoke a public offer.

84. The Netherlands states that there would seem to be no reason for according special treatment to public offers. Public offers also constitute offers if they meet the criteria set out in paragraph (1).

85. Sweden notes that under paragraph (2) advertisements and other public offers are to be considered as offers if they are clearly indicated as such. Sweden notes that this point of view can be accepted, but that it does not seem clear whether such offers can be withdrawn or revoked and, if so, under which circumstances. Sweden states that this question should be clarified if possible.

86. The United Kingdom notes that no specific provision is made for the withdrawal or revocation of public offers. The proposals of the United Kingdom to deal with these problems are set out under articles 9 and 10 at paragraphs 94 and 99 below.

¹³ Article 13 provides: "In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity". (Report of the United Nations Commission on International Trade Law on the work of its tenth session, *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17* (A/32/17), para. 35 (Yearbook . . . 1977, part one, II, A).)

Paragraph (3)

Definition of offer

87. Australia notes that paragraph (3) would more accurately reflect the fact that it is not possible completely to enumerate positively what is necessary to make an offer definite, if the paragraph were framed in a negative fashion so as to state the minimum requirements for an offer to be sufficiently definite. It is suggested that the article begin with the phrase "A proposal is not sufficiently definite unless..." instead of the present formulation "A proposal is sufficiently definite if...".

Failure to make provision for the determination of the price

88. Ghana notes that it expressed a formal reservation to the second sentence of paragraph (3) at the ninth session of the Working Group which adopted this text.

89. Ghana opposes the inclusion of the second sentence of paragraph (3) because it accepted the inclusion of a similar provision in the draft Convention on the International Sale of Goods only on the understanding that national legal systems were to be free to determine whether contracts could be validly formed without agreement on price. The present provision contained in the second sentence of article 8 (3) would make invalid in all the legal systems of Contracting States the formation of contracts which do not state a price or make provision for its determination, even though the national rules of particular legal systems may refuse recognition to such contracts. The Ghana Government deprecates this position. Another reason why Ghana favours the deletion of the second sentence of article 8 (3) is that its formula for the determination of price, where no price has been fixed in the contract, is too one-sided and seller-oriented. It creates the danger of sellers' prices being imposed on buyers after vague negotiations. Even if the second sentence is to be retained in the draft Convention, Ghana prefers more neutral measures, such as the prevailing "market" price or a "reasonable" price.

90. The Hague Conference states that the second sentence of paragraph (3) does not state what one would expect it to say viz., that even if no provision for determining the price is made, a proposal may still be considered as definite, whenever the price may be fixed in accordance with the second sentence. The actual text, however, is nearer a rule of substantive law on the determining of the price and would seem to belong to the scope of the draft Convention on the International Sale of Goods. Moreover, this rule may not apply in all cases, for instance where individual products or objects are sold, so that the rule in the second sentence will leave open cases where the proposal is not definite if no provision for the determination of the price is made.

91. The Hague Conference notes that paragraph (3) also refers to the time of the conclusion of the contract. This seems to confer a certain advantage on the offeree, particularly in the case of irrevocable offers. In a time of fluctuating market prices he can delay his acceptance, delaying thereby the moment of conclusion of the contract and obtaining a more favourable price. It suggests that this effect of fluctuation should be eliminated by fixing a moment (and thereby a price) which is invari-

able. The moment to which reference should be made is that of the dispatch of the offer. This does not work to the disadvantage of the offeree because he will always have the option of refusing the offer if the market price has gone in an unfavourable direction.

Article 9

92. Finland notes that, in view of its comments in relation to article 8, article 9 should apply only to offers to one or more specific persons. Finland proposes that words to that effect should be inserted in article 9.

93. Sweden accepts the compromise achieved between the theories of general revocability of offers and general irrevocability of offers. However, Sweden states that the distinction between withdrawal and revocation of an offer may be somewhat difficult to understand. Consequently, the possibility should be considered of redrafting articles 9 and 10 so that the necessity of using both these concepts is avoided.

94. The United Kingdom proposes that article 9 make provision for the withdrawal of public offers by providing that the withdrawal of such offers may be communicated by taking reasonable steps to bring the withdrawal to the attention of those to whom the offer was addressed.

Article 10

Article as a whole

95. The Federal Republic of Germany particularly welcomes the compromise on the question of revocability embodied in article 10.

96. Sweden states that the possibility of redrafting articles 9 and 10 to avoid using both the concepts of withdrawal and revocation should be considered (see the comments of Sweden under article 9 at paragraph 93 above).

Public offers

97. Finland notes that, in its comments in relation to article 8, it stated that since an offeror of a public offer cannot know whom such an offer has reached, it might be impossible to revoke such an offer.¹⁴ Therefore, it states that article 10 should apply only to offers to one or more specific persons. Finland proposes that words to that effect should be inserted in article 10.

98. On the other hand, the Netherlands points out that article 10 fails to take into account the possibility of revoking a public offer as referred to in the final words of article 8 (2).

99. The United Kingdom proposes that article 10 make provision for the revocation of public offers by providing that the revocation of such offers may be communicated by taking reasonable steps to bring the revocation to the attention of those to whom the offer was addressed.

Revocation of revocable offers where acceptance is by conduct

100. Australia states that paragraph (1), read to-

¹⁴ See para. 83 above.

gether with paragraph (2), makes provision for the revocation of a revocable offer "if the revocation reaches the offeree before he has dispatched his acceptance". However, in the light of article 12 (1), which now provides that acceptance is constituted either by "A declaration or other conduct indicating assent to an offer", paragraph (1) is expressed too narrowly. It is only appropriate to the case where acceptance is constituted by a declaration. It would appear to have the surprising effect that although it prevents an offeror from revoking a revocable offer after an acceptor has dispatched his acceptance, it does not prevent him from doing so where an acceptor has indicated consent to the offer in any other way—even orally. To rectify this omission it is suggested that the words "dispatched his acceptance" in paragraph (1) be replaced with the words "indicated his assent to the offer".

Paragraph (1)

101. The Netherlands notes that paragraph (1) lays down that "the offer is revoked if the revocation reaches the offeree before he has dispatched his acceptance". This wording takes no account of (a) oral acceptance, (b) acceptance by "other conduct indicating assent" which comes to the knowledge of the offeror (art. 12, paras. (1) and (2)), or (c) acceptance as a result of an act as referred to in paragraph (3) of article 12 which need not come to the knowledge of the offeror. It is explained in the Commentary that no rule is necessary to cover these cases, but the Netherlands none the less considers clarification desirable and therefore proposes for paragraph (1) some such wording as: "the offer may be revoked as long as it has not been accepted and notice of acceptance has not been dispatched".

Paragraph (2)

102. Australia does not object to paragraph (2) of this article, but draws attention to the fact that the combined effect of its three subparagraphs will be, in practice, for good or ill, virtually to eliminate the concept of the revocable offer—having regard to the fact that the overwhelming number of offers indicate that they are "firm".

Paragraph (2) subparagraph (b)

103. The United Kingdom is concerned about the provision in paragraph (2) (b) to the effect that an offer cannot be revoked if it states a fixed period of time for acceptance. It is feared that this may constitute a trap for offerors in those countries whose systems differentiate between fixing a time for acceptance (i.e. a time on the expiration of which the offer will lapse) and fixing a time within which an offer may not be revoked.

Paragraph (2) subparagraph (c)

104. The Netherlands observes that subparagraph (2) (c) uses the phrase "has acted in reliance on", while article 18, paragraph (2), uses "has relied on". The Netherlands would favour linguistic uniformity on this point, preferring the expression used in article 18, since it must be possible to cover both an action and failure to act. One could imagine a case in which a person to whom an offer is made trusts that it is being held open and therefore does not respond to an offer from a third party.

Article 12

Article as a whole

105. Australia considers that the draft Convention has been improved in several important respects one of which is the incorporation of acceptance by conduct in article 12.

Offers stipulating no time for acceptance

106. Australia notes that under article 15 if an offer stipulates no time for acceptance, that is, if the time for acceptance is a "reasonable time" under article 12 (2), an acceptor who hears nothing from the offeror after despatching his notice of acceptance, can never be sure whether the offeror regards his acceptance as:

- (i) Effective, because in time, or
- (ii) Ineffective because out of time.

In Australia's view, a provision to the effect that such an acceptance is always effective unless the offeror notifies the offeree to the contrary, would be fairer and simpler. Accordingly, Australia suggests that:

- (i) Article 15 be confined to acceptances of offers that fix a period of time for acceptance, and be re-entitled "Acceptance outside time fixed".
- (ii) A new paragraph (3) be inserted in Article 12, following paragraph (2), along the following lines:
"Where an offer does not fix a period of time for acceptance, an acceptance is effective if the indication of the offeree's assent:
(a) Reaches the offeror within a reasonable time, or
(b) Reaches the offeror at a later time and the offeror does not, without delay, inform the offeree orally that he considers his offer as having lapsed or dispatch a notice to that effect."
- (iii) Paragraph (2) of article 12 be amended by substituting a reference to paragraph (4) for the present reference to paragraph (3) in the first line, and deleting the words in the second sentence commencing "or if no time is fixed", to the end of the sentence, and
- (iv) Paragraph (3) of article 12—which would become paragraph (4)—be amended by deleting the introductory word "However".

Paragraph (1)

Acceptance by silence

107. See the comments of ESCAP and the Netherlands set out under article 2 (3) at paragraphs 54 and 55 above.

108. The Federal Republic of Germany states that the second sentence of article 12 (1) is a source of misgiving. It is acceptable in so far as in legal relationships silence is, in principle, to be taken as a rejection because it cannot be given a positive interpretation. However, there are cases conceivable in which, under the prevailing circumstances, the offeree would be violating the principle of good faith if he did not notify the offeror of his rejection. In such cases it would appear appropriate, by way of exception, to regard silence as acceptance. Article 12 (1), second sentence, does not permit of any such interpretation and can therefore lead

to unreasonable decisions. This provision should therefore be deleted.

Paragraph (2)

109. Finland doubts whether any distinction can be made between the acceptance becoming effective and the conclusion of the contract. Finland states that if no distinction is intended it might be more clear to substitute the words "acceptance of an offer becomes effective" with the words "the contract is concluded".¹⁵

Paragraph (3)

110. Australia observes that although the factual situations which led to the inclusion of paragraph (3) are recognized,¹⁶ it is considered that the inclusion of this paragraph unduly and unnecessarily confuses the main rule contained in paragraph (2) that acceptance by conduct should not be effective until the offeror learns of it. Australia also notes that there is unavoidable uncertainty about the scope of paragraph (3), and hardship may result to an offeror who, in ignorance of the offeree's action and on too narrow an interpretation of paragraph (3), may mistakenly assume the offer has lapsed and make other arrangements accordingly. Australia states that this uncertainty seems unjustifiable having regard to the fact that the provisions of article 2 (2) are available to the parties, under which they clearly may agree to a derogation from the strict requirements of article 12 (2).

Paragraph (4)

111. Australia has no strong objections to this provision but proposes an amendment to article (X) to prevent that article from operating unfairly (see the observations of Australia on article (X) at para. 128 below).

112. The comments of the Federal Republic of Germany on article (X) at paragraph 130 below refer to this provision.

Article 13

Article as a whole

113. Australia considers that the draft Convention has been improved in several important respects particularly by deleting the paragraph of the previous draft of this article which dealt with confirmation of a prior contract of sale (see the observations of Australia at para. 7 above).

Paragraph (1)

114. The Netherlands notes that this paragraph lays down that "a reply to an offer containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer". In the Commentary¹⁷ on articles 11 and 13 it is pointed out that "a

reply that makes inquiries or suggests the possibility of additional terms" should not too soon be regarded as a reply in the sense of this article, since the offeree would then run the risk of the offer being terminated (article 11). In this light the question arises whether the term "reply" in paragraph (1) is not too vague. It would be better to state that paragraph (1) relates only to a reply which is clearly intended as an acceptance of the offer. The word "reply" could perhaps be replaced with "purported acceptance" or even "acceptance" (see para. (2), which already has the term).

115. Sweden states that to avoid misunderstanding it should be indicated in paragraph (1), as has been done in paragraph (2), that the provision concerns a reply to an offer which purports to be an acceptance. In other words, it should be made clear that paragraph (1) does not refer to communications intended to explore the willingness of the offeror to accept different terms while leaving open the possibility of later acceptance of the offer.

Paragraph (2)

116. Australia states that it is in complete agreement with the policy underlying paragraph (2) that a party to a contract formed under the draft Convention should not be able to avoid that contract by relying only on immaterial differences between the offer and acceptance in the well-known "battle of the forms" situation in international commerce. However, by requiring the offeror to make a quick decision whether a reply to his offer contains such modifications as to make it a counter-offer or whether the reply is an acceptance with immaterial alterations, the paragraph places a burden on the offeror. He is left at major risk if he treats as a counter-offer a reply which a court subsequently decides constituted an acceptance. Australia considers that the present wording of paragraph 2 makes this burden unduly heavy. The problem could be alleviated by specifying more precisely the kind of additions or differences to which the paragraph is intended to apply. Australia suggests the additions to the paragraph of a sentence along the following lines:

"Additional or different terms contained in a reply do not materially alter the terms of the offer if, but only if, they deal with insignificant matters such as grammatical changes, typographical errors or the specification of detail implicit in the offer."

Australia notes that a further problem with paragraph (2) is that it gives carte blanche to an offeror to repudiate an agreement on the basis only of immaterial differences between offer and acceptance.

117. Czechoslovakia proposes that paragraph (2) be revised as follows:

"(2) However, a reply to an offer which purports to be an acceptance but which contains a different wording of the terms of the contract without modifying its contents constitutes an acceptance."

Czechoslovakia points out that it should be accepted that the principle that a reply containing any additional or different terms of the contract is not considered to be an acceptance. Czechoslovakia notes that the words "which do not materially alter the terms of the offer" are too vague and may be interpreted in different ways by courts of different countries.

¹⁵ The concept of an acceptance being effective is also used in articles 12 (3), 15 (1), 15 (2), 16 and 17.

¹⁶ See the report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977), A/CN.9/142, at paras. 242-249 (reproduced in the present volume, part two, I, A.).

¹⁷ A/CN.9/144 (reproduced in the present volume, part two, I, D.).

Article 15

Scope of article 15

118. Australia suggests that article 15 be confined to acceptances of offers that fix a period of time for acceptance, and that the article be re-entitled "Acceptance outside time fixed". This proposal is discussed at paragraph 106 above.

Time of conclusion of contract in cases of late acceptance

119. Finland notes that it is not quite clear when a contract is concluded under this article. Finland suggests that the contract is concluded when the late acceptance reaches the offeror.

120. The Netherlands points out that article 15 (1) lays down that "a late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or despatches a notice to that effect". The Netherlands states that if the offeror gives any such notice, the contract becomes effective when the late acceptance has reached the offeror, and not—as the Commentary appears to imply¹⁸—when the offeror despatches his notice. Consequently, the Netherlands states that there is no difference between paragraphs (1) and (2) regarding the date on which the contract becomes effective.¹⁹

Article 18

Paragraph (2)

121. Czechoslovakia states that the main purpose of an agreement in a contract to the effect that such a contract may be modified or rescinded only in writing is a wish of the parties to be safeguarded against tendencies to construe a modification or rescission of the contract only on the basis of negotiations relating to such possibilities. The purpose of paragraph (2) is to grant such a protection. This aim cannot, however, be achieved if it is possible on the basis of article 2, paragraph (2), to derogate from or to vary the effect of article 18, paragraph (2), by an oral agreement as well. Paragraph (2) of article 18 should be, therefore, of mandatory character.

122. The Federal Republic of Germany expresses doubt with regard to the provisions of article 18 (2). The Federal Republic of Germany notes that speedy decisions by the parties to the contract would be impeded. In any case there would appear to be no real need for such a provision. On the one hand it is not readily apparent why parties who, by virtue of article 2, can agree to exclude the application of the whole draft Convention should be bound by provisions which they have established themselves and which, consequently, merely serve their own interests and should, therefore, be subject to their own decision to a far greater degree. Again, article 18 (2) is not borne out by the only argument brought into the discussion, i.e. that contracts must be met (*pacta sunt servanda*), for "*pacta sunt servanda*" does not imply that contracts must for overriding reasons of legal principle always be fulfilled to the

letter and that therefore the parties have no power to modify them. Accordingly, the Federal Republic of Germany proposes that article 18 (2) be deleted.

123. The Netherlands states that article 18 (2) lays down that "a written contract which contains a provision requiring any modifications or rescission to be in writing may not be otherwise modified or rescinded." The Netherlands would prefer that a written contract could be modified by mere agreement; this would be particularly important when general terms and conditions are involved. The other party is often unfamiliar with their substance, and therefore does not know if they contain a condition as referred to in paragraph (1). It is certainly in his interest that such conditions be capable of being derogated from by mere agreement.

124. The Netherlands notes that it prefers the expression "has relied on" to the expression "has acted in reliance on" used in article 10 (2) (c). This matter is discussed at paragraph 104 above.

125. Sweden notes that article 18 (2) provides that a written contract which contains a provision requiring any modification or rescission to be in writing may not be otherwise modified or rescinded. Under Swedish law such a provision is not unconditionally valid and the parties may agree to derogate from it. It is difficult to find any convincing reason for limiting the autonomy of the parties on this specific point. Sweden would therefore prefer article 18 (2) to be deleted.

Paragraph (3)

126. Australia has no strong objections to this provision but proposes an amendment to article (X) to prevent that provision from operating unfairly (see the observations of Australia on article (X) at para. 128 below).

127. The comments of the Federal Republic of Germany on article (X) at paragraph 130 below refer to this provision.

Article (X)

128. Australia states that although it has no strong objection to the inclusion of this article (and to the references thereto in arts. 3 (2), 7 (2), 12 (4) and 18) it is felt that the provision could operate unfairly against a party who negotiates a contract with a party having his place of business in a state which has made a declaration and who has no notice of that state having made a declaration under this article applicable to the subject contract. This objection would be overcome by the addition of a paragraph to the article along the following lines:

"A party to the formation of a contract for sale under this Convention who has his place of business in a contracting state which has made a declaration under this article must before negotiations for formation are entered into notify the other party of the fact that a declaration under this article has been made and that it affects the formation of the contract between them."

129. ECE staff members servicing the Working Party on Facilitation of International Trade Procedures have also studied the draft Convention and note the possibilities offered by article (X) of the draft Convention which makes it possible to overcome the differ-

¹⁸ Para. 3 of the commentary on article 15 (A/CN.9/144).

¹⁹ Compare para. 4 of the commentary on article 15 (A/CN.9/144).

ences between national legal systems as to the form required for the conclusion of a contract and related matters. In the context of the facilitation of international trade procedures the article will, however, not solve the procedural and technical difficulties linked to the requirements referred to in the special declaration mentioned therein. The obligation to conclude a contract in writing, authenticated by signature, must now be considered as an obstacle to electronic and other automatic means of transmitting data for the conclusion of a contract or during the course of an international trade transaction. Certain transport contracts are already concluded by using such means and the rapid development of the market for mini-computers is expected to influence strongly also other trade procedures having legal implications. If UNCITRAL—in view of these developments—were to initiate studies of the legal consequences of the use of electronic and other automatic means of data transmission in international trade, the Working Party on Facilitation of International Trade Procedures would be most interested to follow this work and to provide a link with national trade facilitation bodies which are familiar with the practical aspects of everyday international trade procedures. In an informal team set up by the Working Party to study the practical aspects of such problems, one of the questions raised was the possible need of an international Convention to harmonize national laws on the acceptance of computer printouts as evidence.

130. The Federal Republic of Germany notes that the wording of article 3 (2), 7 (2), 12 (4), 18 (2) and (3) and (X) appears to be somewhat formalistic. These provisions make it possible for Contracting States whose national law does not recognize verbal agreements to assert their stricter formal requirements in international trade by means of the reservation permissible under article (X). This raises doubts for several reasons. In the first place, the possibility of making a reservation in a relatively important area of law relating to the formation of contracts is an obstacle to real international standardization. Secondly, it is hard to see the need for any such reservation at all, since contracts of any economic significance would normally be concluded in writing in any case. And thirdly, if agreements made in connexion with the implementation of international contracts for the sale of goods had to be in writing, this would be an obstacle to quick decisions, which might be necessary due to changed circumstances, and thus raise unnecessary problems for international trade. The Federal Government therefore requests those countries who up to now have not been able to dispense with the reservation provided for in article (X) to reconsider and if possible modify their position.

II. COMMENTS BY MADAGASCAR, NORWAY, THE UNITED STATES OF AMERICA AND YUGOSLAVIA (A/CN.9/146/ADD.1)*

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* 3 May 1978.

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INTRODUCTION

1. This report is an addendum to the analytical compilation of comments by Governments and international organizations on the draft Convention on the Formation of Contracts for the International Sale of Goods as adopted by the Working Group on the International Sale of Goods (hereafter referred to as the draft Convention) and on the draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods prepared by the International Institute for the Unification of Private Law (hereafter referred to as the UNIDROIT draft). It contains an analytical compilation of comments received between 20 April and 2 May 1978 from Madagascar, Norway, the United States of America and Yugoslavia.

ANALYTICAL COMPILATION OF COMMENTS

A. Comments on the draft Convention as a whole

1. General comments on the draft Convention

2. Norway finds the draft Convention on the whole to be a good basis for further work within UNCITRAL on the preparation of a new convention. Norway states that the amendments it would like to suggest are not of a fundamental character.

3. The United States views the draft Convention with general approval. It is believed that, for the most part, the text will render the draft Convention more widely acceptable than its predecessor.

4. Yugoslavia notes that the draft Convention has certain advantages over the Uniform Law on the Formation of Contracts for the International Sale of Goods. However, even this text has not met fully the needs of international trade. The draft Convention, for example, does not mention standard contracts or general conditions, even though the largest number of international trade contracts is concluded by making reference to, or by making use of, such contracts and general conditions. It would be important also to regulate the situation in which each party makes reference to its own forms or general conditions (the so-called "battle of the forms"). The draft Convention does not treat the question of export and import permits and other forms of permission which are of importance at the time of concluding such contracts. In many standard contracts and general conditions formulated by the United Nations Economic Commission for Europe this question is reg-

ulated, hence, in the opinion of Yugoslavia, adequate attention should be paid to this subject-matter by the draft Convention as well.

5. Yugoslavia also notes that there is no justification for the fact that the draft Convention does not include the provisions of article 11 of the Uniform Law on the Formation of Contracts for the International Sale of Goods on the effect of death and incapacity of a party to submit offers.¹ Yugoslavia states that it would be highly beneficial to international trade if such a convention were to regulate the question of initiating bankruptcy proceedings or other analogous proceedings for the conclusion of a contract.

6. Yugoslavia states that the draft Convention, for the most part, relates to the offer and acceptance (even though these questions are not regulated in detail). However, the draft Convention has failed to take into account a series of other questions which are also important for the formation of contracts, for example, the question of the subject-matter of the contract and the purpose or grounds of the contract. On the other hand, the draft Convention contains certain provisions for which it can rightly be said that they are irrelevant to the formation of contracts (article 18 on modification and rescission of contracts). Yugoslavia states that these provisions could give rise to confusion, particularly because the title of the draft Convention does not indicate that it relates to problems other than those concerning the formation of contracts.

2. *Relationship to the draft Convention on the International Sale of Goods*

7. Norway states that the scope of the draft Convention should be the same as the scope of the draft Convention on the International Sale of Goods (CISG). Whether the two draft Conventions should be amalgamated or not depends mainly on the question whether an over-all Convention would be as acceptable to States as CISG would be. One should refrain from efforts to amalgamate the two drafts if that would render CISG less acceptable or unnecessarily complicate and delay the work on the said Convention. The Norwegian Government is therefore not in favour of such amalgamation.

3. *Relationship to UNIDROIT draft*

8. Norway states that the problems covered by the UNIDROIT draft seem to be relatively rare events in respect of contracts for the international sale of goods. Further the draft deals with an area in which increased harmonization of national law would seem hard to achieve. It may also be a risk that the provisions might be understood as being exhaustive. This will increase the importance of the problem of qualifying a matter as a question of validity or of breach of contract. The draft as it stands would seem to be less mature for finalizing deliberations. It does not seem expedient to include additional provisions of the UNIDROIT draft into the draft Convention.

9. The United States notes that the draft Convention incorporates from the UNIDROIT draft the mate-

rial on interpretation, which is the most important matter dealt with in that draft.

10. Yugoslavia states that the UNIDROIT draft has not been harmonized with the new codifications (Convention on the Limitation Period in the International Sale of Goods, draft Convention on the International Sale of Goods). Yugoslavia notes that it is rather unusual that this was not done by the UNCITRAL Working Group on the International Sale of Goods. Instead, a text was forwarded whose many provisions have not been harmonized with the other texts with which the draft Convention should constitute a single whole. Proceeding from the foregoing observations and the circumstances that this draft was produced under the auspices of UNIDROIT as early as 1972, Yugoslav experts are of the opinion that it will need to undergo substantive changes in order that it may be adapted to a whole series of conventions which are being drafted by UNCITRAL on purchase-sale problems.

B. *Comments on specific provisions of the draft Convention*

Article 2

Unilateral variation or exclusion of Convention

11. Norway notes that, under paragraphs (1) and (2), the parties may agree to exclude the application of the draft Convention or derogate from or vary the effect of its provisions. The wording of the paragraphs suggests that the offeror may not unilaterally exclude the application of the draft Convention or derogate from its provisions. This differs from the system in article 2 of the 1964 Hague Uniform Law on the Formation of Contracts for the International Sale of Goods and seems to raise problems which need further consideration. It should here be noted that the question of application of alternative rules does not seem to be quite the same with regard to formation of contracts as with regard to the material content of contracts (see the different rules in this respect in the Norwegian Acts of Agreements and of Sales).

12. Yugoslavia notes that it emerges from paragraphs (1) and (2) of this article that it is possible to exclude the application of this Convention only through explicit agreements, while individual provisions may be tacitly excluded. In the view of Yugoslavia this concept has not been sufficiently clearly expressed.

Article 3

Paragraph (1)

13. Yugoslavia notes that as regards form it would suffice to stipulate simply that a contract "may be proved by any means". There is no need to make specific reference to "witnesses" as this is understood.

Paragraph (2)

14. See the comments of Norway on article (X) at paragraph 46 below.

Article 4

Article as a whole

¹ Article 11 provides: "The formation of the contract is not affected by the death of one of the parties or by his becoming incapable of contracting before acceptance unless the contrary results from the intention of the parties, usage or the nature of the transaction".

Scope of the article

15. Norway notes that the commentary states that "article 4 on interpretation, as is the case with all the provisions in this draft Convention, relates only to the formation process. This article does not provide rules for interpreting the contract of sale, once a contract of sale has been concluded".² Norway questions whether this limited application of the article has been expressed sufficiently clearly in the text.

Nature of test for determining intent

16. Norway notes that it seems that the main rule from a practical point of view is found in paragraph (2), whilst an exception from this rule is included in paragraph (1). It is therefore proposed to change the order of the paragraphs.

17. Yugoslavia states that the provisions relating to interpretation are good, necessary and useful in such a text. The draft Convention proceeds from a subjective criterion (paragraph (1)) to an objective criterion (paragraph (2)) and that the objective criterion is applied in a subsidiary manner. Yugoslavia points out that, in principle, this approach is good, although, perhaps, these two paragraphs should be made more uniform and formulated in a way to constitute a single norm. More specifically, it would be necessary to further examine the intent of parties, so that imprecise provisions are interpreted according to the "understanding that a reasonable person would have had in the same circumstances". This is even more important in view of the fact that an objective criterion should help in formulating uniform rules on interpretation. Such a criterion would also serve the interests of economically weaker contracting parties who, more often than not, are not familiar with all the finesse involved in the process of concluding contracts in international trade. Therefore, although it would be advisable to proceed from the intent of parties as the basic principle, it would be useful to draw the objective criterion closer to it as the two criteria should not be separate.

18. Yugoslavia also notes that in paragraph (1) a question arises of how to interpret the intent "where the other party knew or ought to have known what that intent was". Will the criterion of a "reasonable person" apply in this case, or will it be interpreted in such a way as to take into account the mutual relations of the negotiating parties?

Paragraph (1)

19. Norway suggests that consideration be given to replacing the expression "ought to have known" by "could not have been unaware of".³

Paragraphs (1) and (2)

20. The United States points out that it would simplify the draft if the long phrase, "communications, statements and declarations by and conduct of a party", were replaced by "a party's language and conduct" in both (1) and (2). They would then read:

² A/CN.9/144, para. 1, of the commentary on article 4 (reproduced in the present volume, part two, I, D.).

³ The expression "ought to have known" also appears in articles 1 (4) (a) and 6.

"(1) A party's language and conduct are to be interpreted according to his intent, where the other party knew or ought to have known what that intent was.

"(2) If the preceding paragraph is not applicable, a party's language and conduct are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances."

Article 5

Article as a whole

21. The United States favours the deletion of this article. The United States observes that the provision has no counterpart in the draft Convention on the International Sale of Goods and the terms "fair dealing" and "good faith" do not have a sufficiently precise meaning in international trade to warrant their use in such a statute.

22. Yugoslavia notes that this article is well formulated. However, because of its importance Yugoslavia states that it should be placed among the preceding articles.

Consequences of failure to comply with article 5

23. Norway notes that the article as drafted seems to contain only a declaration of principle to which no specific consequences have been attached. It might be asked whether such a provision should not be redrafted and placed in a possible future convention on the validity of contracts.

Article 7

Article as a whole

24. Yugoslavia notes that the heading of the article is inadequate.

Paragraph (1)

25. Yugoslavia notes that linguistically the provision could be more clearly formulated. For example, Yugoslavia states that it cannot be said that "an offer, declaration of acceptance . . . was delivered to his place of business". Also it is not clear what is meant by the term "indication of intention". Is it a declaration of intent, irrespective of whether made explicitly or implicitly?

Paragraph (2)

26. See the comments of Norway on article (X) at paragraph 46 below.

Article 8

Paragraphs (1) and (2)

27. Yugoslavia notes that in this article the definition of offer is given in the sense of a proposal addressed to one or more specific persons. However, a question could be posed about public offers addressed to an unspecified number of persons.

Paragraph (3)

28. Norway states that according to paragraph (3) a

proposal may in some cases be deemed not to be sufficiently definite if it makes no provision for determining the price. Consideration should be given to modifying this condition when the contract has been performed by delivery of the goods.

Article 10

Paragraph (1)

29. The United States notes that it would be desirable to add language to deal with acceptance by conduct where nothing is "dispatched". The relation of this paragraph to article 12 should be clarified.

30. Yugoslavia states that the principle of "irrevocability" (and not "revocability") is more suitable for the security of international trade, and this should constitute one of the fundamental objectives which the draft Convention should aim at achieving. The right of revocability creates insecurity on the part of the offeree. He is obliged to make, within a specified time, the necessary preparations, negotiate with subcontractors and buyers, and to carry out other studies so that he may make a decision on acceptance or refusal of the offer. For all these reasons, Yugoslavia suggests that this question be re-examined and that paragraph (1) should contain a formulation of the principle of irrevocability, and the following paragraph contain exceptions to this principle.

Paragraph (2) (b)

31. The United States proposes that paragraph (2) (b) should be deleted. Time-limits in offers may have two distinct purposes. One—that of lapse—is to indicate a time after which it is too late to accept ("This offer expires if not accepted in 10 days."). Another—that of irrevocability—is to indicate a time during which the offeror cannot revoke his offer ("This offer is irrevocable for 10 days."). This clause confuses the two by assuming that any time-limit has the second effect of irrevocability, even if the parties may have made it clear that they intended only the first effect of lapse. This is a particularly objectionable rule for countries, such as the United States, where there is a well-recognized difference between provisions for lapse and those for irrevocability, and both are given effect according to their terms. An American businessman would be startled to find that language clearly indicating only the purpose of lapse was to be given the effect of irrevocability as well. Even more so this is unfortunate if both parties come from such countries that the understanding of both would be frustrated by paragraph (2) (b).

Paragraph (2) (c)

32. Norway questions whether paragraph (2) (c) is sufficiently precise. Norway prefers a more elaborated rule on irrevocability of offers.

33. Yugoslavia states that the term "the offer being held open" is not clear. Should it be retained, a definition would be required. In practice, moreover, difficulties could emerge (especially in legal systems in which this is not known) with respect to determining when, and how, the offeree "has acted in reliance on the offer". Consequently, Yugoslavia suggests that a

more precise formulation be given or that paragraph (2) (c) be deleted.

Article 12

Acceptance by conduct

34. Yugoslavia notes that the formulation "a declaration or other conduct by the offeree" is not the most suitable since the term "other conduct" could be interpreted as not constituting a declaration of intent by action (a tacit declaration of intent). The meaning could be made more precise by adding the word "explicit" declaration...

Acceptance by silence

35. Yugoslavia makes the following observations in relation to the second sentence of article 12 which provides that silence shall not in itself amount to acceptance. Yugoslavia notes that if the expression "shall not in itself" is intended to apply only to exceptions, this phrase should be better formulated and more precisely stated. On the other hand, if the parties maintain continuing business relations, silence, in itself, could constitute an acceptance in so far as the offeree does not declare that he does not accept the offer.

Paragraph (3)

36. The United States points out that this paragraph does not appear to be consistent with article 10 (1). (See the comments of the United States on article 10 (1) at para. 29 above.)

Paragraph (4)

37. See the comments of Norway on article (X) at paragraph 46 below.

Article 13

Paragraph (1)

38. The United States points out that this paragraph would be easier to read if the words "a reply to an offer" were replaced by "a purported acceptance". The United States also points out that the present version of paragraph (1) is inaccurate in that it suggests that a request for clarification that is sent in reply to an offer is a rejection.

Paragraph (2)

39. The United States points out that this paragraph would be easier to read if the words "a reply to an offer which purports to be an acceptance but" were replaced by "a purported acceptance".

40. Yugoslavia states that in this article the basic problem is to establish the circumstances in which additional or different terms do not "materially alter the terms of the offer". It would be highly useful if the concept of substantive change could be defined, a task extremely difficult to accomplish. Perhaps the same effect could be achieved if instead of the aforementioned words it could be said that a reply to an offer containing additional or different terms could constitute an acceptance "if the circumstances indicate that

the parties, in spite of this, are intent on concluding a contract".

Article 15

Paragraph (1)

41. See the comments of Norway on article (X) at paragraph 46 below.

Article 17

42/43. Yugoslavia is of the opinion that this article should be deleted.

Article 18

Article as a whole

44. Yugoslavia is of the opinion that this article should be deleted because it is irrelevant to the formation of contracts. These provisions could give rise to confusion, particularly because the title to the draft Convention does not indicate that it relates to problems other than those concerning the formation of contracts (see also para. 6 above).

45. See the comments of Norway on article (X) at paragraph 46 below.

Article (X)

46. Norway states that article (X) is supplemented by a separate paragraph in articles 3 (2), 7 (2), 12 (4) and 18 (3). This system seems to be unnecessarily complicated. These separate paragraphs do not add anything which cannot be achieved by the formulation of article (X). Further, the system of the draft Convention with separate paragraphs in the affected articles does not seem to be quite consistent. Thus there is no separate reservation for writing in connexion with the information given orally after article 15 (1).

C. Comments on the UNIDROIT draft

47. Madagascar notes that since, on the one hand, the provisions concerning defects in the contract, particularly those relating to mistake and consent, are of a general and conventional nature and, on the other, they seem to be in keeping with legal practice in this field, it has no comments to make on them.

48. The Malagasy Government does, however, express some reservations with respect to article 4, paragraph 2, of the draft law, which permits the use of oral evidence for the purpose of applying article 3, concerning substantive procedures for the establishment of the contract; this method by itself is very unreliable, especially now that modern technology, particularly telegraphic communication, provides the parties with much more reliable procedures for international sales. It is hard to see, once it is agreed, as it must be, that in many cases contracts for the international sale of goods can be concluded by modern means such as telegraphic communication, how oral evidence can be accepted in this connexion. If there is no other way of establishing the facts—although this will very seldom be the case—then oral evidence will no doubt have to be used, but the question is whether it is really necessary to spell it out, thus opening the way to practices that are

far too unreliable, particularly if it is borne in mind that, by definition, any contract for the international sale of goods involves a number of important details (nature and quality of goods, terms of payment, place and date of delivery, etc.) on which, in case of dispute, it is likely to prove difficult to rule in favour of one party or the other. Accordingly, although it appears likely that this type of evidence will in practice be very seldom used, it would seem wiser not to refer to it at all in the draft law.

III. COMMENTS BY FRANCE (A/CN.9/146/ADD.2)*

1. This addendum contains the observations of France which were received by the Secretariat on 9 May 1978.

I. General observations

2. There seems to be no reason for maintaining two separate instruments governing respectively the formation of contracts of sale and the effects of such contracts, since the sphere of application as laid down in article 1 is exactly the same.

3. Accordingly, the French Government is of the view that the draft Convention on the Formation of Contracts should be integrated into the draft Convention on the International Sale of Goods (CISG) adopted by UNCITRAL at its tenth session.

4. The French delegation looks forward with interest to the document on this question which the Secretariat will be submitting at the request of the Working Group.

5. It is regrettable that no provisions relating to the validity of contracts have been included in the draft Convention, since this would have been the only point on which the new draft Conventions went beyond the two Hague Conventions of 1964.

6. Articles 4 and 5 are innovations not found in earlier instruments. The French Government is favourably disposed towards them. The rules relating to good faith and interpretation should apply to both the content and the performance of a contract. Accordingly, they should also be included in CISG.

7. The article headings should be deleted. They add nothing to the text and are sometimes ambiguous (arts. 1, 2, 7 and (X)) or incorrect (art. 16: "révocation" instead of "retrait"; art. 17: "date" instead of "moment").** Moreover, there are no article headings in the draft CISG adopted at Vienna in 1977. The chapter titles provide sufficient guidance to the reader.

II. Specific observations

Title of the draft Convention

8. The title should be amended to read: "*Projet de convention sur la formation du contrat de vente internationale de marchandise*".**

Article 8

Paragraph (2)

9. It would be desirable to reverse the rule, so that

* 9 May 1978.

** These observations do not appear to apply to the English text.

an offer to the public at large would bind the offeror in the same way as an offer made to a specific person. This would provide a clear rule and would avoid the difficulties which will arise in interpreting the phrase "unless the contrary is clearly indicated by the person making the proposal".

Paragraph (3)

10. There is a contradiction between the first and the second sentences. The first sentence lays down the principle that, in order for a contract to be formed, the price must be fixed or capable of being determined. The second sentence implies the opposite. The French Government is firmly opposed to any solution which would allow a contract to be considered concluded when the price is neither fixed nor capable of being determined. It therefore requests the deletion of the second sentence. Article 37 of CISG is all that is needed in order to determine the price when it is uncertain. The rule laid down in that article is valid as regards payment of the price, but it should not be extended, as is proposed, to apply to the formation of contracts.

Article 18

11. This article does not relate to the formation of contracts but to their modification and rescission. It should therefore be transferred to CISG.

12. The second sentence of paragraph (2) is unclear. It will give rise to errors in interpretation. It should therefore be deleted, especially since the principle of good faith, as stated in article 5, suffices to ensure the desired result.

IV. COMMENTS BY THE GERMAN DEMOCRATIC REPUBLIC (A/CN.9/146/ADD.3)*

1. This addendum contains the observations of the German Democratic Republic which were received by the Secretariat on 10 May 1978.

2. The German Democratic Republic considers it desirable to examine at the eleventh session of UNCITRAL the following matters in connexion with the discussion on the draft Convention on the Formation of Contracts for the International Sale of Goods.

3. In their current state the draft Convention on the International Sale of Goods (CISG) and the present draft Convention on the Formation of Contracts for the International Sale of Goods do not yet cover the problems of the validity of contracts for the international sale of goods. In order to arrive at a regulation which will be as complete as possible, provisions on the various aspects of the validity of declarations (offer, acceptance) and of contracts should be included in the present draft Convention. The German Democratic Republic has in mind here rescission on account of error, incorrect transmission and fraud, but also violation of legal prohibitions, approval of contracts, voidness of individual terms of contract and contracts subject to conditions precedent and subsequent.

4. As a basis for an exchange of views the German Democratic Republic takes leave to submit the following amendments which could be included in the draft Convention at various points:

A

Violation of legal prohibitions and impossibility of performance

A declaration is void if it violates a statutory prohibition or has as its object an impossible performance.

B

Grounds for rescission

(1) The declarant has the right to rescind his declaration if, despite the observance of customary commercial care, he was in error as to the contents of the declaration on making it.

(2) The declarant also has the right to rescind his declaration if, despite the observance of customary commercial care, he was in ignorance of the facts, including the essential characteristics of persons or things, and, with knowledge of the facts, would not have made such a declaration.

(3) The declarant also has the right to rescind his declaration if it was incorrectly transmitted.

(4) The declarant has moreover the right to rescind his declaration if he has been induced by fraud or threats, by or on behalf of the addressee of the declaration, to make a declaration.

C

Exercise of rescission

(1) The rescission is effective only if the party entitled to rescind declares it immediately after he has gained knowledge of the grounds of rescission or, in the case of a threat, immediately after its removal. Rescission is excluded if the party entitled to rescind, after discovery of the error, confirms his original declaration.

(2) The opposing party has the right to object to the rescission within a period of one month. If the opposing party fails to object within this period, the rescission is deemed to have been effected. If the opposing party objects, the party entitled to rescind may only enforce his right of rescission within three months of receipt of the objection by the competent court or arbitral tribunal.

(3) The right of rescission in accordance with (1) expires not later than two years after submission of the declaration.

D

Legal consequences of rescission

(1) A successfully rescinded declaration is void from the outset.

(2) In the case of paragraph B (4) the rescinding party is entitled to demand compensation from the opposing party.

(3) In all other cases of rescission the opposing party has the right to demand reimbursement of expenditure from the rescinding party unless he knew, or should have known, the grounds for rescission.

* 10 May 1978.

E

Coming into effect of a contract

(1) A contract of sale is concluded only at the moment the contracting parties have agreed upon all items upon which agreement was to be achieved according to the will of one party.

(2) A contract of sale is concluded also in case that various conditions are invalid, if it is to be supposed that the parties would have concluded the contract even without these conditions.

F

Conditions precedent and subsequent

If a contract is entered into subject to a condition precedent or subsequent, it becomes effective or invalid upon fulfilment of the condition.

G

Approval by a third party or by the party represented

(1) If a contract has been concluded subject to the approval of a third party, it will become effective at the moment this approval is given.

(2) This will apply also in case the contract was concluded by a representative with reservation as to be approved by the person represented.

5. In many legal orders there is a clause on *culpa in contrahendo* (fault at formation of contract). It is therefore considered appropriate to add a second paragraph to article 5 of the draft Convention, which could read as follows:

"(2) In case a party violates the duties of care customary in the preparation and formation of a contract of sale, the other party may claim compensation for the costs borne by it."

6. The representatives of the German Democratic Republic at the eleventh UNCITRAL session will make additional verbal and written statements at the UNCITRAL session itself on matters of less principal importance than those set forth in paragraphs 3 and 4 of these observations.

7. Finally it is also suggested to conduct at the eleventh session of UNCITRAL an exchange of views on whether only *one* draft of the Convention should be submitted to the Diplomatic Conference of States, regulating both the formation and the contents of the contract on the international sale of goods or whether the above-mentioned separate draft conventions should be maintained.

V. COMMENTS BY THE INTERNATIONAL CHAMBER OF COMMERCE (A/CN.9/146/ADD.4)*

1. This addendum sets out the observations of the International Chamber of Commerce (ICC) which were received on 22 May 1978.

A. *Comments on the draft convention as a whole*

2. ICC has taken a favourable position both to the

1964 Hague Convention relating to a Uniform Law on the International Sale of Goods and to the UNCITRAL draft Convention on the same subject-matter. Now, when an UNCITRAL draft Convention on the Formation of Contracts for the International Sale of Goods is under consideration, the general view of the Commission on International Commercial Practice of the ICC (hereafter referred to as the Commission) to the project will be very much the same. Unification of the law on the formation of contracts will be of practical value for the international trade and the greater the number of States adhering to any uniform rules the more useful they will become. The 1964 Hague Convention on Formation (ULF) represents by itself a remarkable piece of unification and is in the course of being ratified by a number of States in Europe, Asia and Africa. Contrary to ULIS, this Convention has never met with serious or widespread criticism. The Commission therefore regrets that the Working Group did not find it possible to follow the wording and the presentation of the subject-matter in ULF more closely.

3. The Commission reiterates its view expressed already in the ICC statement on the draft Convention on the International Sale of Goods (as prepared by the Special Working Group)¹ that the present efforts of unification must not without compelling reasons differ from what has already been achieved in 1964. It is also important that in the elaboration of the transitional provisions due consideration be given to the situation of States which have already ratified ULF 1964 and the difficulties for these States of replacing the earlier convention by a new one. If this is not the case, a considerable number of States may feel prevented from adhering to the new Convention or may postpone such adherence.

B. *Comments on the provisions of the draft Convention*

Sphere of application

4. The Commission refers to what was said in this respect in the said ICC statement on the draft Sales Convention. The provision that the Convention applies not only between parties from Contracting States but also when the rules of private international law lead to the application of the law of a Contracting State, may represent a useful compromise. The more clear-cut solution that the Convention applies only in the relationship between parties from different Contracting States should, however, be reconsidered.

Place of business

5. As said in the ICC statement, the Commission finds the provision relating to "place of business" inadequate. One and the same company may be said to have several "places of business" not only in different countries but also in one and the same country and the relevant place to send an answer to may be another than the place of business as defined for other purposes. The present provisions do not allow the identification of the relevant place of business satisfactorily.

* 23 May 1978.

¹ This statement is reproduced in document A/CN.9/125 (Yearbook...1977, part two, I, D).

Autonomy of the parties

6. Article 2 (1) provides that only "agreement" between the parties may exclude the application of the convention. However, a party wanting to negotiate a contract under its domestic law rules, e.g. by stating in a set of General Conditions appended to an offer that any contract is to be governed by that law, should be allowed to do so.

7. Further, prior practice between the parties or usage, generally, may exclude or substitute the application of particular rules in the convention without previous "agreement" thereon being necessary. This should be adequately reflected in article 2 (2).

Form

8. The provisions in the present draft deleting any requirements of form for the formation of a contract are in line with the provisions in the draft Sales Convention. The Commission refers to paragraphs 13 and 14 in the said ICC statement, but finds the present contents allowing a State to make a declaration/reservation on this point acceptable as a compromise.

Interpretation

9. Any distinction between interpretation of offers and acceptances on the one side and interpretation of contracts on the other is untenable or most futile and must be avoided. Neither the draft Sales Convention nor ULF (1964) contains any rules on interpretation of contracts, offers or acceptances, except that the relevance of usages is stressed. The Commission refers in that respect to what is said in the said ICC statement on usages and interpretation of trade terms (paras. 8-11).

10. To let one party's "intent" prevail over the regular ordinary meaning only because the other party *ought* to have understood that the first party expressed himself improperly, is not acceptable. The provisions on interpretation in article 4 could very well be deleted but if retained, a more "objective" standard of interpretation must be set up, e.g. as follows:

- (i) Communications, statements and declarations by and acts of a party shall be interpreted according to the meaning usually given to them in the trade concerned, or where no such particular meaning is given to them in the trade concerned, according to their ordinary meaning. However, if another but common (alternatively: "mutual" or "joint") intent of the parties can be established, such common intent shall prevail.
- (ii) A party may not rely on such usual or ordinary meaning as said in paragraph (1), if he knew or could not have been unaware of (alternatively: or ought to have known) that the other party understood such communication, statement, declaration or act differently.

Fair dealing and good faith

11. The Commission does not object to the inclusion of such provision in the convention. However, in some countries, Courts seem to be prepared to give such phrases a rather wide and wholly unpredictable interpretation and application. One might therefore also consider the deletion of this provision, particularly as it does not appear in the draft Sales Convention.

Usage

12. The Commission refers here to what was said in the said ICC statement (paras. 8-11) on usages and the remarks above to article 2 (2).

Offer

13. The effect of article 8 (3) now seems to be that an offer is sufficiently definite to make a contract upon acceptance if it only indicates the kind of goods, quantity and price. According to the Secretariat's commentary, however, it is always a matter of interpretation in the particular case whether the offeror intended to be bound upon acceptance. This may also be in accordance with general understanding in commercial relations where parties frequently expect more details of the bargain to be defined than the said ones before the contract can be considered as concluded. The present text should therefore be adjusted so as to correspond more closely on this point to the contents of the commentary.

Withdrawal and revocation of offer

14. In general, the compromise reached here between the legal systems in which an offer stands, at least for a reasonable time, and those in which an offer always can be revoked until it has been accepted, seems workable. However, one should reconsider whether the contents could not be presented in a more easily intelligible way. The distinction between withdrawal of offer and revocation of offer is puzzling and a consolidated article on when an offer lapses may be useful. Further, the rule that an offer cannot be withdrawn after it has "reached" the addressee seems too narrow if applied to letters or telex communications. The deadline should be the moment when the communication came to the knowledge of the addressee or when the addressee in some way acted thereupon.

Acceptance

15. The Commission wants to stress the importance of the rule that offers may be accepted by "other conduct" than oral or written declarations, e.g. by dispatch of the goods. Although silence in itself shall not amount to acceptance, it may do so in a given particular situation. The wording of article 12 (3) may also be too narrow and the more generous formulation in article 6 (2) of ULF preferable.

Additions or modifications to the offer

16. Here an important exception from the rule that silence does not amount to acceptance is introduced. Additional or different terms which do "not materially" alter the terms of the offer become part of the contract unless objected to. Such rule is acceptable only if the interpretation of the words "not materially" is kept within some, rather narrow limits. A clarification in that direction would be useful.

Late acceptance

17. It might be reconsidered whether or not the rule in article 15 (2) that late acceptance may nevertheless be effective unless objected to, should be given a wider application (narrowing thereby the application of the rule in para. 1).

Modification and rescission of contract

18. In sets of general conditions or in particular contracts, one meets rather frequently provisions saying that terms and conditions set out may not be modified unless in writing. Indeed, when a contract is made in writing, it is a matter of order and good business routine to have any changes and modifications therein recorded in writing. Such provisions are usually understood or applied as recommendations. That a failure to observe them should result in making a modification orally agreed upon null and void would, however, be a rather harsh sanction. It may lead to considerable inequities which cannot entirely be removed by the help of the rule of estoppel in the last sentence of article 18 (2). Such a rule would also not be in accordance with the

overruling policy in the convention, article 3, opposing requirements of written form in the formation of a contract. The Commission suggests therefore that the present provision which has no counterpart in ULF (1964) be deleted. Even if such rule is deleted, a contractual provision of this kind would not be entirely without effects. It would usually establish a presumption against the parties maintaining that the oral agreement modifying the main contract has been concluded.

C. Comments on the UNIDROIT draft

19. The UNIDROIT draft rules relating to the validity of contracts which the Working Group has not included in its draft do not give rise to any particular comments.

G. List of relevant documents not reproduced in the present volume

WORKING GROUP ON THE INTERNATIONAL SALE OF GOODS, NINTH SESSION

<i>Title or description</i>	<i>Document Symbol</i>
Provisional agenda and annotations	A/CN.9/WG.2/L.4
Article 14, as adopted by the Working Group on first reading	A/CN.9/WG.2(IX)/CRP.1
Proposal by the representative of France, article 14	A/CN.9/WG.2(IX)/CRP.2
Proposal by the representative of Ghana, article 2	A/CN.9/WG.2(IX)/CRP.3
Proposal by the representative of the United Kingdom, article 2	A/CN.9/WG.2(IX)/CRP.4
Proposal by the representative of France on the meaning of silence	A/CN.9/WG.2(IX)/CRP.5
Proposal by the representative of the Union of Soviet Socialist Republics, article 3	A/CN.9/WG.2(IX)/CRP.6
Proposal by the representative of the Union of Soviet Socialist Republics, articles 3A, (X), 8 and 12	A/CN.9/WG.2(IX)/CRP.7
Proposal by the representative of the United Kingdom, article 5	A/CN.9/WG.2(IX)/CRP.8
Proposal by the representative of Japan, article on public offers	A/CN.9/WG.2(IX)/CRP.9
Article 1, as adopted by the Working Group on first reading	A/CN.9/WG.2(IX)/CRP.10
Article 4, as adopted by the Working Group on first reading	A/CN.9/WG.2(IX)/CRP.11
Draft report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977)	A/CN.9/WG.2(IX)/CRP.12 and Add. 1-11
Proposal by the representative of Czechoslovakia, articles 10A and 10B	A/CN.9/WG.2(IX)/CRP.13
Proposal by the observer of the International Chamber of Commerce, article 14	A/CN.9/WG.2(IX)/CRP.14
Report of the Drafting Group	A/CN.9/WG.2(IX)/CRP.15 and Add. 1 and 2

II. INTERNATIONAL PAYMENTS

A. Report of the Working Group on International Negotiable Instruments on the work of its fifth session (New York, 18-29 July 1977) (A/CN.9/141)*

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INTRODUCTION

1. In response to decisions by the United Nations Commission on International Trade Law (UNCITRAL), the Secretary-General prepared a "Draft Uniform Law on International Bills of Exchange and International Promissory Notes, with commentary" (A/CN.9/WG.IV/WP.2).¹ At its fifth session (1972), the Commission established a Working Group on International Negotiable Instruments. The Commission requested that the above draft uniform law be submitted to the Working Group and entrusted the Working Group with the preparation of a final draft.²

2. The Working Group held its first session in Geneva in January 1973. At that session the Working Group considered articles of the draft uniform law relating to transfer and negotiation (articles 12 to 22), the rights and liabilities of signatories (articles 27 to 40), and the definition and rights of a "holder" and a "protected holder" (articles 5, 6 and 23 to 26).³

3. The second session of the Working Group was held in New York in January 1974. At that session the Working Group continued consideration of articles of the draft uniform law relating to the rights and liabilities of signatories (articles 41 to 45) and considered articles in respect of presentment, dishonour and recourse, including the legal effects of protest and notice of dishonour (articles 46 to 62).⁴

4. The third session was held in Geneva in January 1975. At that session the Working Group continued its consideration of the articles concerning notice of dishonour (articles 63 to 66). The Group also considered provisions regarding the sum due to a holder and to a party secondarily liable who takes up and pays the instrument (articles 67 and 68) and provisions regarding the circumstances in which a party is discharged of his liability (articles 69 to 78).⁵

5. The fourth session of the Working Group was held in New York in February 1976. At that session the Working Group considered articles 79 to 86 and articles 1 to 11 of the draft uniform law, thereby completing its first reading of the draft text of that law.⁶

6. The Working Group held its fifth session at United Nations Headquarters in New York from 18 to 29 July 1977. The Working Group consists of the following eight members of the Commission: Egypt, France, India, Mexico, Nigeria, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America. With the exception of Egypt and Nigeria, all the members of the Working Group were represented at the fifth session. The session was also attended by observers of the following States: Argentina, Austria, Brazil, Burundi, Chad, Chile, Germany, Federal Republic of, Liberia, Malaysia, Philippines, Thailand and Turkey, and by observers from the International Monetary Fund, the European Communities, the Hague Conference on Private International Law and the European Banking Federation.

* 10 August 1977.

¹ UNCITRAL, report on the fourth session (1971), para. 35 (Yearbook . . . 1971, part one, II, A). For a brief history of the subject up to the fourth session of the Commission, see A/CN.9/53, paras. 1 to 7; UNCITRAL, report on the fifth session (1972), para. 61 (2) (c) (Yearbook . . . 1972, part one, II, A).

² UNCITRAL, report on the fifth session (1972), para. 61 (1) (a).

³ Report of the Working Group on International Negotiable Instruments on the work of its first session (Geneva, 8-19 January 1973), A/CN.9/77 (Yearbook . . . 1973, part two, II, 1).

⁴ Report of the Working Group on the work of its second session (New York, 7-18 January 1974), A/CN.9/86 (Yearbook . . . 1974, part two, II, 1).

⁵ Report of the Working Group on the work of its third session (Geneva, 6-17 January 1975), A/CN.9/99 (Yearbook . . . 1975, part two, II, 1).

⁶ Report of the Working Group on the work of its fourth session (New York, 2-12 February 1976), A/CN.9/117 (Yearbook . . . 1976, part two, II, 1).

7. The Working Group elected the following officers:

Chairman Mr. René Roblot (France)
Rapporteur Mr. Roberto Luis Mantilla-Molina (Mexico)

8. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.7); draft uniform law on international bills of exchange and international promissory notes, with commentary (A/CN.9/WG.IV/WP.2); draft uniform law on international bills of exchange and international promissory notes (first revision) (A/CN.9/WG.IV/WP.6 and Add. 1 and 2); and the respective reports of the Working Group on the work of its first (A/CN.9/77), second (A/CN.9/86), third (A/CN.9/99) and fourth (A/CN.9/117) sessions.

DELIBERATIONS AND DECISIONS

9. At the present session the Working Group began consideration of the revised text of the draft uniform law on international bills of exchange and international promissory notes, prepared by the Secretariat on the basis of the deliberations and decisions of the Working Group as recorded in its reports on the work of its four previous sessions.

10. The text of each article as revised appears at the beginning of the report on the deliberations with respect to that article.

11. In the course of its session, the Working Group considered articles 1 to 23 of the revised draft uniform law and commenced consideration of article 24. The text of the articles as approved, or deferred for further consideration, by the Working Group is set forth in the annex to this report.

12. At the close of its session, the Working Group expressed its appreciation to the observers of Member States of the United Nations and to representatives of international organizations who had attended the session. The Group also expressed its appreciation to the representatives of international banking and trade organizations that are members of the UNCITRAL Study Group on International Payments for the assistance they had given to the Group and the Secretariat. The Working Group expressed the hope that the members of the Study Group would continue to make their experience and services available during the remaining phases of the current project.

Draft uniform law on international bills of exchange and international promissory notes

13. The Working Group decided to propose to the Commission that the uniform provisions governing international bills of exchange and international promissory notes should be set forth in the form of a convention rather than in the form of a uniform law. The Group requested the Secretariat to amend the proposed text accordingly.

Titles and subtitles

14. The Working Group decided to review the titles and subtitles of the draft convention upon completion of its consideration of the revised text.

A. Articles 1 to 3 (*sphere of application; form*)

"Article 1

"(1) This Law applies to international bills of exchange and to international promissory notes.

"(2) An international bill of exchange is a written instrument which

"(a) Contains, in the text thereof, the words 'Pay against this international bill of exchange, governed by [the Convention of . . .]';

"(b) Contains an unconditional order whereby one person (the drawer) directs another person (the drawee) to pay a definite sum of money to a specified person (the payee) or to his order;

"(c) Is payable on demand or at a definite time;

"(d) Is signed by the drawer;

"(e) Is dated;

"(f) Shows that at least two of the following places are situated in different States:

"(i) The place indicated next to the signature of the drawer;

"(ii) The place indicated next to the name of the drawee;

"(iii) The place indicated next to the name of the payee;

"(iv) The place of payment.

"(3) An international promissory note is a written instrument which

"(a) Contains, in the text thereof, the words 'Against this international promissory note, governed by [the Convention of . . .]';

"(b) Contains an unconditional promise whereby one person (the maker) undertakes to pay a definite sum of money to a specified person (the payee) or to his order;

"(c) Is payable on demand or at a definite time;

"(d) Is signed by the maker;

"(e) Is dated;

"(f) Shows that at least two of the following places are situated in different States:

"(i) The place where the instrument was made;

"(ii) The place indicated next to the signature of the maker;

"(iii) The place indicated next to the name of the payee;

"(iv) The place of payment.

"(4) Proof that the statements referred to in paragraph (2)(f) or (3)(f) of this article are incorrect does not affect the application of this Law."

15. The Working Group recalled that, at its fourth session, it had noted that States having ratified the Geneva Convention of 1930 for the Settlement of Certain Conflicts of Laws in connexion with Bills of Exchange and Promissory Notes might be prevented from ratifying a convention such as the one now under consideration. The Group noted that the Hague Confer-

ence on Private International Law had included the preparation of a new convention on conflicts of law in respect of negotiable instruments in its programme of work. It was suggested that the Hague Conference might wish to give priority to the consideration of the relationship between the 1930 Geneva Convention on conflicts of laws and the proposed Convention and report its conclusions to the Working Group at a future session. Several representatives stated that linking the solution of the problem of compatibility of the proposed Convention to work on conflict rules might slow down or even postpone the work on the proposed Convention.

Paragraph (1)

16. The Working Group approved the text of this paragraph.

Paragraph (2), subparagraph (a)

17. The Working Group decided to amend this subparagraph as follows:

Contains, in the text thereof, the words "international bill of exchange [Convention of . . .]".

18. The amendment was made on the following grounds:

(a) Under at least one legal system, an order to pay would not be unconditional if the instrument stated that it was subject to or governed by any other agreement, and the reference in the text of an instrument that it was "governed by the Convention of . . ." could possibly be construed as a reference to an agreement;

(b) The words "Pay against this international bill of exchange" could be interpreted in a restrictive sense so as to exclude from the application of the Convention a bill which contained, e.g., the words "Please pay against this international bill of exchange", or other direction to pay couched in courteous terms.

19. It was noted that subparagraph (a) was a formal requisite.

Paragraph (2), subparagraph (b)

20. The Working Group was of the view that this subparagraph could be construed in such a way as to exclude the possibility of the drawer and the drawee being the same person since the latter is referred to as "another person". The Group was of the opinion that this might be too restrictive since it was not unknown in commercial practice for the drawer to draw a bill on himself (e.g. a bill drawn by one branch of a bank on another branch of the same bank). Accordingly, the Group decided to redraft subparagraph (b) in a way that would not exclude the possibility of the drawer and the drawee of a bill being the same person, i.e. by eliminating the word "person" and the words "another person" from the subparagraph and substituting therefor the words "drawer", "drawee" or "payee" as appropriate. However, some representatives noted their preference for the term "person" with its well-settled connotation of someone having legal capacity.

21. One representative stated that, in her opinion, the words "or to his order" were not necessary. Another representative, however, whilst noting that, under the proposed Convention, the words "to the

order of" or "to his order" were irrelevant to the negotiability of the international instrument in that its omission would not prevent transfer under article 13, was of the view that the words "or to his order" should be maintained since under the Uniform Commercial Code their omission did prevent negotiation and a drawer in the United States would thus follow the well-established practice in the United States to draw a bill "to the order of . . .".

22. The Working Group approved the following text of subparagraph (b):

"(b) Contains an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to his order."

Paragraph (2), subparagraphs (c), (d), and (e)

23. The Working Group approved the present text of these subparagraphs. However, the Group decided to renumber subparagraphs (d) to (f) in such a way that the substance of what is now subparagraph (d) would appear as the last item on the list of criteria enumerated under paragraph (2). Under this new numbering, therefore, the present subparagraph (e) would become subparagraph (d), the present subparagraph (f) would become subparagraph (e) and the present subparagraph (d) would become subparagraph (f).

Paragraph (2), subparagraph (f)

24. The view was expressed that the present text of subparagraph (f) might be too restrictive in its listing of the places relevant to the determination of the international nature of a bill and, hence, of the application of the Convention. It was noted that the list did not include the place of drawing of the bill which in commercial practice was often the main indicator of the international character of a bill. The result would be that a substantial number of bills of exchange currently in use in international payments would not qualify as international bills under the Convention.

25. The Working Group considered various suggestions. Under one suggestion, the opening words of subparagraph (f) should be reformulated as follows: "Does not show that all of the following places are situated in the same State". In support of this suggestion it was argued that this rule would make the Convention inclusionary rather than exclusionary and bring within the scope of the Convention as many types of bills of exchange encountered in commercial practice as reasonably possible. The effect of the formulation was thus that if a bill was silent as to the places enumerated under subparagraph (f), it could nevertheless qualify as an international bill of exchange under the Convention by virtue only of compliance with the provision of paragraph (2) (b) of article 1. The Working Group did not retain this suggestion.

26. The Working Group decided to amend subparagraph (f) by inserting the additional criterion of "the place where the bill was drawn".

Paragraph (3)

27. The Working Group decided to adapt the text to conform with the changes made in the preceding paragraph.

Paragraph (4)

28. The Working Group approved the text of this paragraph, making only appropriate changes in subparagraph letter references to conform to the decisions taken in paragraphs 23 and 27 above.

Article 2
(deleted)

29. The Working Group noted that, in the revised text, this article had been deleted. The Group concurred with the deletion on the ground that the article was unnecessary.

"Article 3"

"This Law applies (in a contracting State) without regard to whether the places indicated on an international bill of exchange or on an international promissory note pursuant to paragraph (2) (f) or (3) (f) of article 1 are situated in contracting States."

30. The Working Group approved the text of this article as currently drafted subject to deletion of the words "(in a contracting State)" appearing in the first line of the article.

31. One representative stated that she would have preferred retention of these words and removal of the brackets.

*B. Articles 4 to 11 (interpretation)**"Article 4"*

"In the interpretation and application of this Law, regard is to be had to its international character and to the need to promote uniformity."

32. The Working Group approved the text of this article without change.

"Article 5"

"In this Law:

"(1) 'Bill' means an international bill of exchange governed by this Law;

"(2) 'Note' means an international promissory note governed by this Law;

"(3) 'Instrument' means an international bill of exchange or an international promissory note governed by this Law;

"(4) 'Drawee' means the person on whom a bill is drawn but who has not accepted it;

"(5) 'Payee' means the person in whose favour the drawer directs payment to be made or the maker promises to pay;

"(6) 'Holder' means the person referred to in article 13 *bis*;

"(7) 'Protected holder' means a holder of an instrument which, when it came into his possession, was complete and regular on its face and not overdue, provided that, at that time, he was without actual knowledge of any claim to or defence upon the instrument or of the fact that it was dishonoured for non-acceptance or non-payment;

"(8) 'Party' means a party to an instrument;

"(9) 'Maturity' means the date of payment indicated on the instrument and, in the case of a demand bill, the date on which the instrument is first presented for acceptance or for payment;

"(10) 'Forged signature' includes a signature which is forged by the wrongful or unauthorized use of a stamp, symbol, facsimile, perforation or other means by which a signature may be made in accordance with article 27."

Paragraphs (1), (2), (3), (4), (5), (6) and (10)

33. The Working Group approved the text of these paragraphs.

34. The Working Group considered, but did not retain, a suggestion to insert between paragraphs (3) and (4) a definition of "drawer", on the ground that such a definition would serve no purpose beyond that already served by the provision of paragraph (2) (a) of article 1.

35. The Working Group considered, but did not retain, the suggestion that the definition of "drawee" be deleted. The Group noted that, in the Geneva Uniform Law on Bills of Exchange and Promissory Notes, the term "drawee" was also used for the acceptor. The draft Convention, however, distinguished explicitly between drawee and acceptor, and it was thus necessary to define clearly the term "drawee" as the person on whom the bill is drawn but who has not accepted it.

Paragraphs (7), (8) and (9)

36. The Working Group decided to consider the definitions of "protected holder", "party" and "maturity" in connexion with its consideration of the substantive provisions embodying these concepts.

Article 6
(deleted)

37. The Working Group noted that article 6 of the original draft had been deleted because the concept of "knowledge" had been dealt with in the context of "protected holder" in article 5.

"Article 7"

"The sum payable by an instrument is deemed to be a definite sum although the instrument states that it is to be paid

"(a) With interest;

"(b) By instalments at successive dates;

"(c) By instalments at successive dates with the stipulation on the instrument that upon default in payment of any instalment the unpaid balance becomes due;

"(d) According to a rate of exchange indicated on the instrument or to be determined as directed by the instrument; or

"(e) In a currency other than the currency in which the amount of the instrument is expressed."

Paragraphs (a), (b) and (c)

38. The Working Group approved the text of these paragraphs.

Paragraph (d)

39. The Working Group noted that this paragraph was designed to cover the case of a bill drawn as follows: "Pay \$US 5,000 in Swiss francs at the rate of exchange of 2.50 Swiss francs to the dollar" or "pay \$US 5,000 in Swiss francs at the rate of exchange prevailing at maturity".

40. The question was raised whether paragraph (d) should be expanded to cover not just cases of the above type, but such other cases as, for example, where the order calls for the payment of "such amount of Swiss francs as is equivalent to 1000 United States dollars of 1934 value". The Working Group, having considered this question, was of the opinion that it was not desirable to extend the range of application of paragraph (d) in the manner suggested, not only because of the uncertainty which might result from such a provision but also because inquiry among banking circles had revealed very little practical need for such a provision. It was noted in this connexion that paragraph (d) was itself already a significant extension of the law currently in force in many States, including States adhering to the Geneva Convention of 1930 providing a Uniform Law for Bills of Exchange and Promissory Notes. Accordingly, the Group decided to maintain the text of this paragraph.

41. The Working Group was agreed that, in the context of paragraph (d), the sum payable by an instrument could be deemed to be a definite sum if at any time of payment the holder was able to determine the amount then payable from the instrument itself with any necessary computation.

Paragraph (e)

42. The Working Group approved the text of this paragraph without change.

43. The Working Group further considered the question whether multicurrency clauses could be used in an international instrument. It was noted that such clauses might be devised in the future. The Group, after deliberation, decided to submit this question to the Commission for further consideration.

44. The Working Group took note of a proposal to insert into article 7 a new paragraph which would provide as follows:

"The appearance in the instrument of clauses: 'issued under Contract No. . . .', 'issued under Letter of Credit No. . . .', 'in debit of account No. . . .', and other equivalent clauses, not included in the body of the instrument and merely referring either to the transaction which gave rise to the instrument, or to the source out of which payment is to be made, does not make the order or the promise to pay conditional, if it is unconditional in all other respects."

"Article 8"

"(1) If there is a discrepancy between the amount of the instrument expressed in words and the amount expressed in figures, the sum payable is the amount expressed in words.

"(2) If the sum payable by an instrument is specified in a currency having the same denomination in at least one other State than the State where payment is to be made as indicated on the instrument and the specified currency is not identified as the currency of any State, the instrument is payable in the currency of the State where payment is to be made.

"(3) If an instrument states that it is to be paid with interest, without specifying the date from which interest is to run, interest runs from the date of the instrument.

"(4) A stipulation on an instrument stating that it is to be paid with interest is to be disregarded unless it indicates the rate at which interest is to be paid."

Paragraph (1)

45. The Working Group approved the text of this paragraph.

Paragraph (2)

46. The Working Group adopted, with slight revision, the present text of this paragraph. The paragraph as revised reads as follows:

"(2) If the amount of the instrument is expressed in a currency having the same description as that of at least one other State than the State where payment is to be made as indicated on the instrument and the specified currency is not identified as the currency of any State, the currency is to be considered as the currency of the State where payment is to be made."

47. The question was raised whether the words "as indicated on the instrument" were not too restrictive and, if so, should not be deleted. The following example was given: "Pay 1,000 francs to Mr. Rossi in Rome" and the bill is drawn by a bank in Zurich. Under one view, since the bill was drawn by a bank in Switzerland the reference to "francs" should be interpreted as a reference to Swiss francs. The Working Group did not reach a consensus on such an interpretation and requested the Secretariat to consult banking and trade institutions on whether such instruments were found in practice and, if so, how they were interpreted.

Paragraphs (3) and (4)

48. The Working Group approved the text of these two paragraphs.

"Article 9"

"(1) An instrument is deemed to be payable on demand

"(a) If it states that it is payable on demand or at sight or on presentment or if it contains words of similar import; or

"(b) If no time for payment is expressed.

"(2) [An instrument payable at a definite time which is accepted or endorsed or guaranteed after maturity is an instrument payable on demand as regards the acceptor, the endorser or the guarantor.]

"(3) An instrument is deemed to be payable at a definite time if it states that it is payable

"(a) On a stated date or at a fixed period after a

stated date or at a fixed period after the date of the instrument; or

“(b) At a fixed period after sight; or

“(c) By instalments at successive dates; or

“(d) By instalments at successive dates with the stipulation on the instrument that upon default in payment of any instalment the unpaid balance becomes due.

“(4) The time of payment of an instrument payable at a fixed period after date is determined by reference to the date of the instrument.”

Paragraph (1), subparagraphs (a) and (b)

49. The Working Group approved the text of these two subparagraphs.

Paragraph (2)

50. The Working Group approved the text of this paragraph and decided also to remove the brackets around the text.

Paragraph (3), subparagraph (a)

51. The Working Group decided to maintain the present text of this subparagraph, although the view was expressed that there was a certain redundancy in the two expressions “stated date” and “fixed period after a stated date”, as the latter was itself a “stated date”. It was felt that such a redundancy, if any, could be tolerated in the interest of clarity since bills were often drawn in practice along the lines suggested by the text.

Paragraph (4)

52. The Working Group approved the text of paragraph (4).

53. The Working Group adopted a proposal to supplement the present text of this paragraph with a provision designed, like article 35 of the Geneva Uniform Law, to regulate maturity in the case of an instrument payable at a fixed period after sight. The provision reads as follows:

“The maturity of a bill payable at a fixed period after sight is determined by the date of the acceptance.”

54. The question was raised as to how the maturity of a note payable at a fixed period after sight should be determined. It was noted that article 78 of the Geneva Uniform Law provided that such notes must be presented for the visa of the maker and that the period of time would run from the date of the visa signed by the maker on the note. If the maker refused to give his visa with the date thereon, the refusal must be authenticated by a protest and the date of such protest would mark the commencement of the period of time after sight.

55. The Working Group concluded that the draft Convention should likewise recognize this practice and adopted provisionally the following new paragraph, which would be placed in brackets:

“[The maturity of a note payable at a fixed period after sight is determined by the date of the visa signed by the maker on the note or, if signature is refused, from the date of presentment.]”

56. The Working Group requested the Secretariat to review the draft text, to ascertain the extent to which this practice was in operation and to make appropriate recommendations on how the practice might best be accommodated, with due regard to any other relevant provisions in the draft Convention.

New paragraph

57. The Working Group also adopted a proposal to insert as a new paragraph of article 9 the following text designed, like article 36 of the Geneva Uniform Law on Bills of Exchange, to resolve the ambiguity caused by the unevenness in the number of days which make up calendar months:

“Where an instrument is drawn, or made, payable at one or more months after a stated date or after the date of the instrument or after sight, the instrument matures on the corresponding date of the month when payment must be made. If there is no corresponding date, the instrument matures on the last day of that month.”

“Article 10

“(1) A bill may

“(a) Be drawn upon two or more drawees,

“(b) Be drawn by two or more drawers,

“(c) Be payable to two or more payees.

“(2) A note may

“(a) Be made by two or more makers,

“(b) Be payable to two or more payees.

“(3) If an instrument is payable to two or more payees in the alternative, it is payable to any one of them and any one of them in possession of the instrument may exercise the rights of a holder. In any other case the instrument is payable to all of them and the rights of a holder can only be exercised by all of them.”

Paragraphs (1) and (2)

58. The Working Group approved the text of these paragraphs.

Paragraph (3)

59. The question was considered whether the present text permitted the drawing of a bill in the form “Pay to A and/or B the sum of . . .” and, if so, what the effect of such an order was. Under one view, the text of the paragraph covered this situation and, under the second sentence of that paragraph, such an order would be treated as an order to pay to A and B. Under another view, paragraph (3) still left doubtful the question whether the use of the “and/or” device in an instrument precluded the validity of the instrument on the ground of indefiniteness of payee.

60. The Working Group decided to retain the text of paragraph (3) as at present drafted and requested the Secretariat to explain in the Commentary that the effect under paragraph (3) of the use of the “and/or” formula in an instrument is to bring the instrument within the second sentence of that paragraph, and thus make the instrument payable not in the alternative.

Drawer and drawee as one

61. The Working Group considered whether the draft Convention should expressly provide that a bill may be drawn by the drawer on himself. It was suggested that such a provision would conform to established practice and that the draft Convention should set forth a rule based on article 6 of the Geneva Uniform Law on Cheques which provides that a cheque may not be drawn on the drawer himself unless it is drawn by the establishment on another establishment belonging to the same drawer. The further suggestion was made that these two establishments should be situated in different States. According to a third suggestion the provision contemplated should be based on article 3 of the Geneva Uniform Law on Bills of Exchange and Promissory Notes.

62. The Working Group, after deliberation, adopted the following text as article 10 *bis*:

"A bill may be drawn by the drawer on himself or be drawn payable to his order."

"Article 11"

"(1) An incomplete instrument containing the words 'Pay against this international bill of exchange governed by [the Convention of . . .]' or the words 'Against this international promissory note governed by [the Convention of . . .]' which is signed by the drawer or the maker but which lacks elements pertaining to one or more of the requirements set out in paragraphs 2 or 3 of article 1 may be completed and the instrument so completed is effective as a bill or a note.

"(2) When such an instrument is completed otherwise than in accordance with agreements entered into

"(a) Parties who signed the instrument before the completion may invoke the absence of agreement as a defence against a holder with knowledge of the absence of agreement;

"(b) Parties who signed the instrument after the completion are liable according to the terms of the instrument so completed."

Paragraph (1)

63. The Working Group approved the substance of this paragraph and requested the Secretariat to adapt the text of the paragraph to conform with the change made with respect to the words "Pay against this international bill of exchange governed by [the Convention of . . .]" in article 1 (2) (a). The paragraph as adopted reads as follows:

"An incomplete instrument which satisfies the requirements set out in subparagraphs (a) and (f) of paragraph (2) or (a) and (f) of paragraph (3) of article 1 but which lacks other elements pertaining to one or more of the requirements set out in paragraphs (2) or (3) of article 1 may be completed and the instrument so completed is effective as a bill or a note."

Paragraph (2), subparagraph (a)

64. With respect to this subparagraph, the Working Group adopted a proposal to incorporate a reference to

article 68 so as to clarify the legal relation between a party who takes up and pays an instrument under that article and one who signed the instrument before it was completed otherwise than in accordance with applicable agreements. The Group also decided to substitute the words "non-observance of the agreement" for the words "absence of agreement" wherever the latter occurred in the subparagraph.

65. The subparagraph as adopted reads as follows:

"A party who signed the instrument before the completion may invoke the non-observance of the agreement as a defence against a holder or against any other person who exercises a right of recourse in accordance with article 68, provided such a person or holder has knowledge of the non-observance of the agreement."

66. Two views were expressed with regard to this subparagraph. Doubts were expressed regarding the requirement of knowledge, since the required proof of actual knowledge was extremely difficult to establish. According to another view, it might be useful to specify in the subparagraphs, as done in the Geneva Uniform Law on Bills of Exchange, at what point the party concerned had to have the requisite knowledge. The Working Group decided to revert to this question when it would consider the concept of "knowledge" in the context of other provisions of the draft Convention, in particular in the context of a definition of "protected holder".

Subparagraph (b)

67. The Working Group approved the text of this subparagraph, subject to changing the word "Parties" to "A party", and the word "are" to "is".

*C. Articles 12 to 22 (transfer; holder)**Article 12*
(deleted)

68. The Working Group noted that it had deleted this article at its first session (see A/CN.9/77, paras. 10-13; Yearbook . . . 1973, part two, II, 1).

"Article 13"

"An instrument is transferred

"(a) By endorsement and delivery of the instrument by the endorser to the endorsee; or

"(b) By mere delivery of the instrument if the last endorsement is in blank."

69. The Working Group approved the text of this article.

New article

(to be inserted between article 13 and article 13 *bis*)

"(a) An endorsement must be written on the instrument or on a slip affixed thereto ('allonge'). It must be signed.

"(b) An endorsement may be made

"(i) In blank, that is, by a signature alone or by a signature accompanied by a statement to the effect that the instrument is payable to any person in possession thereof;

- “(ii) Special, that is, by a signature accompanied by an indication of the person to whom the instrument is payable.”

70. The Working Group decided that it would be useful to include in the draft Convention provisions relating to the means by which an endorsement may be effected, and which specifically would make clear that the endorser's signature alone is sufficient. Accordingly, the Group approved the text appearing above as a new article to be inserted between article 13 and article 13 *bis*.

71. Two issues were raised with regard to that text. Firstly, with regard to paragraph (a), the question was raised whether it did not unduly complicate matters to expressly recognize the making of endorsements on a separate slip affixed to the instrument (“allonge”), especially in view of the provision of article 19 respecting the determination of the order of endorsements on an instrument. It was pointed out, however, that the concept of the “allonge” was well known and widely used in practice and could not, therefore, be ignored. Furthermore, the draft Convention itself already recognized the device in other provisions, as for example, in article 43 (2) with respect to the guarantee of payment.

72. Secondly, with regard to paragraph (b) (i) of the article, one representative doubted the correctness, as a matter of law, of equating the endorsement in blank with “a signature accompanied by a statement to the effect that the instrument is payable to any person in possession thereof” as that subparagraph appears to do. This representative would, therefore, delete the part of the subparagraph just quoted.

“Article 13 bis

- “(1) A person is a holder if he is
- “(a) The payee in possession of the instrument;
or
- “(b) In possession of an instrument
- “(i) Which has been endorsed to him; or
- “(ii) On which the last endorsement is in blank and on which there appears an uninterrupted series of endorsements, even if any of the endorsements was forged or was signed by an agent without authority.
- “(2) When an endorsement in blank is followed by another endorsement, the person who signed this last endorsement is deemed to be an endorsee by the endorsement in blank.

“(3) A person is not prevented from being a holder by the fact that the instrument was obtained under circumstances, including incapacity or fraud, duress or mistake of any kind, that would give rise to a claim to, or to a defence upon the instrument.”

73. The Working Group approved the text of this article.

“Article 14

“If the transfer under paragraph (a) of article 13 is incomplete because the endorsement is lacking, the transferee is entitled to require the transfer or to endorse the instrument to him, unless otherwise agreed.”

74. The Working Group decided to delete this article on the ground that it stated the obvious and was thus unnecessary.

“Article 15

“The holder of an instrument on which the last endorsement is in blank may

“(a) Further endorse the instrument either in blank or to a specified person; or

“(b) Convert the blank endorsement into a special endorsement by indicating therein that the instrument is payable to himself or to some other specified person; or

“(c) Transfer the instrument in accordance with paragraph (b) of article 13.”

75. The Working Group approved the text of this article.

76. The question was raised whether the holder of an instrument on which the last endorsement is in blank who transfers the instrument by mere delivery (cf. article 13 (b)), would be liable on the instrument to subsequent parties. The Working Group was agreed that such a transferor, since he had not signed the instrument, was not a party to the instrument and thus had no liability thereon.

“Article 16

“When the drawer, the maker or an endorser has inserted in the instrument or in the endorsement such words as ‘not negotiable’, ‘not transferable’, ‘not to order’, ‘pay (X) only’, or words of similar import, the transferee does not become a holder except for purposes of collection.”

77. The Working Group discussed this article at some length with many divergent views expressed as to the content and effect of the article and the purpose which it meant to serve. Thus, according to one view the article was concerned primarily with attempts by parties to exclude or limit their liability on the instrument which it was the policy of the draft Convention to permit. Consequently, the same result would be reached by virtue of other provisions in the draft even should article 16 be deleted. According to another view, the article was not concerned with limitation of liability but with restriction of circulation of an instrument. Accordingly, there was need for this specific article to remain in the Convention.

78. Among the proposals made with regard to article 16 were: to retain the article without change; to delete the provision altogether; to make separate provision for the effect of “not negotiable” clauses added by the drawer or the maker, and by an endorser or to have a separate provision along the lines of article 15 of the Geneva Uniform Law on Bills of Exchange which states that the effect of an endorsement containing a non-negotiability clause is to render the endorser's guarantee ineffectual. The proposal was also made that the drawer or the maker should be able to partially limit the transferability of the instrument.⁷

⁷ The following substitute text was therefore proposed for article 16:

“Article 16

“(a) When the drawer or the maker has inserted in the instrument

79. The view was also expressed that it was awkward to state, as the present draft does, that "the transferee does not become a holder except for purposes of collection". Since the transferee in such a case would in fact become a "holder", preference was voiced for the positive formulation to the effect that the transferee was a holder but only for purposes of collection. Another representative favoured the maintenance of the negative formulation in the text, observing that the content of both formulations was the same.

80. The Working Group retained the text of this article as at present drafted but decided to place the entire text in brackets for further consideration at a future session at which time the Secretariat should have sought the opinion of banking and other commercial interests as to which solution was the soundest.

"Article 17"

"(1) An endorsement must be unconditional.

"(2) A conditional endorsement transfers the instrument irrespective of whether the condition is fulfilled.

"(3) A claim to or a defence upon the instrument based on the fact that the condition was not fulfilled may not be raised except by the party who endorsed conditionally against his immediate endorsee."

Paragraph (1)

81. The Working Group decided to delete this paragraph on the ground that there was a certain incompatibility between it and paragraphs (2) and (3) which give some effect to a conditional endorsement.

Paragraph (2)

82. The Working Group approved the text of this paragraph without change.

Paragraph (3)

83. The Working Group considered a proposal to delete this paragraph on the ground that it dealt with merely personal defences.

84. As to the relationship between paragraph (3) and the definition of "protected holder" in article 5 (7), it was pointed out that a holder other than the immediate transferee of a conditional endorser, if he took with knowledge of the fact that the condition had not been fulfilled, might be precluded from becoming a "protected holder" under that definition since he would have taken with "actual knowledge of a claim to or defence upon the instrument". Retaining paragraph

such words as "not negotiable", "not transferable", "not to order", "pay (X) only", or words of similar import, the transferee becomes a holder only for purposes of collection.

"(b) When the drawer or the maker has inserted in the instrument such words as "negotiable (transferable, to order) only once (twice and so on)" or "negotiable (transferable, to order) only to a bank (specified bank or any bank and so on), an endorsee who has acquired the instrument otherwise than indicated in the instrument becomes a holder only for purposes of collection.

"(c) When the endorser has inserted in the endorsement words (clauses) implying prohibition, fully or partially, or a limitation of further transfer of the instrument, he gives no guarantee to persons to whom the instrument is subsequently endorsed."

(3) would make it clear that this special rule was being created for this case, whereas its deletion would leave no clear solution to the problem.

85. The Working Group decided to retain this paragraph subject to substitution of the word "transferee" for the word "endorsee" in the last line of the paragraph, so that the paragraph would now read:

"(3) A claim to or a defence upon the instrument based on the fact that the condition was not fulfilled may not be raised except by the party who endorsed conditionally against his immediate transferee."

The purpose of substituting the word "transferee" for the word "endorsee" was to deal with a transfer under a blank endorsement.

86. The Working Group was agreed that the purpose of paragraph (3) was to confer absolute protection on a remote holder, even if such holder knew about the non-fulfilment of the condition, and that such holder should have the status of a protected holder if he otherwise so qualified.

"Article 18"

"An endorsement in respect of a part of the sum due under the instrument is ineffective as an endorsement."

87. The proposal was made to delete the words "as an endorsement" at the end of the article on the ground that it was redundant and might create the impression that such an endorsement was effective in some other way. In response, it was pointed out that a partial endorsement could still be effective for some other purpose under national law, for instance, as an assignment. Consequently, it was only necessary for purposes of the Convention to say that such an endorsement was not effective as an endorsement under the Convention.

88. The Working Group decided to retain the text of this article.

"Article 19"

"When there are two or more endorsements, it is presumed, unless the contrary is established, that each endorsement was made in the order in which it appears on the instrument."

89. The Working Group noted that the primary purpose of this article was to establish a presumption of fact as to the time sequence amongst endorsements appearing on an instrument, namely, that each endorsement was made in the order in which it appears. In the event of a dishonour by non-acceptance or by non-payment, upon payment by a party to the holder, those parties who had a right of recourse against the payer are discharged.

90. The question was raised whether a rebuttal of the presumption could only be made by deducing proof from within the instrument or whether such proof could also be deduced from outside the instrument. The Group was of the view that proof could also be brought from outside the instrument, but that such a need would mainly arise in the case of endorsements in blank.

91. The Working Group approved the text of article 19 as set out above.

"Article 20"

"(1) When an endorsement contains the words 'for collection', 'for deposit', 'value in collection', 'by procuration', or words of similar import, authorizing the endorsee to collect the instrument (endorsement for collection), the endorsee

"(a) May only endorse the instrument on the same terms;

"(b) May exercise all the rights arising out of the instrument;

"(c) Is subject to all claims and defences which may be set up against the endorser.

"(2) The endorser for collection is not liable upon the instrument to any subsequent holder."

92. The Working Group approved this article, subject to adding, in paragraph (1), the words "pay any bank" after the words "by procuration", and replacing in paragraph (1) (a) the words "on the same terms" by the words "for purposes of collection".

93. It was noted that an endorsement reading "pay any bank" was, under the Uniform Commercial Code of the United States, treated like an endorsement for deposit or collection.

94. The question was raised whether the endorsee for collection, in addition to being subject to all claims and defences which may be set up against the endorser, was also subject to claims and defences which may be set up against him. Under one view, the endorsee for collection should not be considered as a holder in his own right and, therefore, the word "all" in paragraph (1) (c) should be replaced by "only those", so as to make it clear that the only claims and defences that could be set up against the endorsee were those that could be set up against his endorser. One representative was of the opinion that the Working Group should state explicitly that an obligor could not raise against the endorsee for collection claims or defences that were based on his personal relationship with the endorsee.

95. The suggestion was made that article 20 should make provision for the situation envisaged in article 18 of the Geneva Uniform Law on Bills of Exchange and Promissory Notes. Under that article, "the mandate contained in an endorsement by procuration does not terminate by reason of the death of the party giving the mandate or by reason of his becoming legally incapable".

96. Various issues were raised during the discussion of this suggestion:

(a) Is the endorsee for collection an agent of the endorser or a holder in his own right?

(b) Is payment to the endorsee for collection a good discharge if the authority was terminated or revoked and the person paying the instrument had notice of such termination or revocation?

(c) Should the endorsement remain effective in the case of:

- (i) Death of the endorser;
- (ii) Legal incapacity;
- (iii) Bankruptcy;
- (iv) Dissolution?

97. The Working Group considered various pro-

posals in respect of the above issues.⁸ The Group decided not to take a decision on these issues at the present session but to request the Secretariat to study the problems involved, in particular the status of the endorsee for collection, and to submit draft proposals to it at its next session.

"Article 21"

"The holder of an instrument may transfer it to a prior party or the drawee in accordance with article 13; nevertheless, in the case where the transferee was a prior holder of the instrument, no endorsement is required and any endorsement which would prevent him from qualifying as a holder may be struck out."

98. The Working Group approved this article.

99. The proposal was made, but not retained, that article 21 should be drafted on the lines of article 20 of the Geneva Uniform Law on Bills of Exchange and Promissory Notes.⁹

"Article 21 bis"

"An instrument may be transferred in accordance with article 13 after maturity, except by the drawee, the acceptor or the maker."

100. The Working Group approved this article.

"Article 22"

"(1) If an endorsement is forged the person whose endorsement is forged has against the forger and against the person who took the instrument directly from the forger the right to recover compensation for any damage that he may have suffered because of the forgery.

"(2) The drawer or maker of the instrument has a similar right to compensation in circumstances where damage is caused to him by the forgery of the signature of the payee.

"(3) For the purposes of this article a signature placed on the instrument by an agent without authority has the same consequences as a forgery."

⁸ One representative submitted the following alternatives:

Alternative A

The endorsement for collection remains effective after the death of the endorser or any modification in his legal capacity.

The revocation of the mandate is effective against third persons only if such revocation results from the instrument itself.

Alternative B

The endorsement for collection remains in effect in the case of the death, incapacity or bankruptcy of the endorser, or, in the case of an entity, dissolution.

The revocation of a mandate is effective against third persons only if such revocation results from the instrument itself.

Another representative submitted the following proposal in relation to article 70:

"Payment to an endorsee for collection is effective under this article notwithstanding the termination or revocation of the authority of the endorsee."

⁹ "An endorsement after maturity has the same effects as an endorsement before maturity. Nevertheless, an endorsement after protest for non-payment, or after the expiration of the limit of time fixed for drawing up the protest, operates only as an ordinary assignment...."

Paragraph (1)

101. The Working Group approved this paragraph. The Group was agreed that the provision would apply in situations illustrated by the following example: the drawer, D, issues a bill, accepted by the drawee, A, to the payee, P. X steals the bill from P, forges his signature and transfers the bill to B. A pays the bill to B. A is discharged since he paid to a holder (cf. article 70 (1)) and may debit the account of D. Under article 22 (1), P has the right to recover compensation from X and from B.

Paragraph (2)

102. The Working Group noted that this paragraph was intended to cover situations where the payee had never been in the possession of the instrument as illustrated in the following example. The drawer, D, sends a bill, accepted by A, by post to the payee, P. Before the bill reaches P, it is stolen from the post. The thief, X, forges P's signature, and transfers the bill to B. A pays the bill to B. A is discharged and may debit the account of D. However, D's debt to P is not extinguished since P did not receive the bill. D, who still must pay P, suffers damage and has a right to compensation, outside the bill, against X and B.

103. The question was raised whether the provision of paragraph (2) was wide enough to embrace all cases where damage was suffered because of a forged signature. The following example was given: A sells goods to B and draws a bill on B in favour of himself. B accepts and sends the bill accepted by him to A. Before the bill reaches A, it is stolen from the post. The thief, X, forges A's signature and transfers the bill to C. C receives payment from B. The view was expressed that, although B was discharged on the bill, he might not be allowed to debit the account of A since the price of the goods had not been paid to A. If B cannot debit the account of A, he suffers damages and should therefore be able to recover compensation by exercising a cause of action against X and C. Therefore, the provision set forth in paragraph (2) should be broadened along the following lines:

"If a signature on the instrument is forged, any party has against the forger and against the person who took the instrument directly from the forger the right to recover compensation for any damage he may have suffered because of the forgery."

104. Under another view, the rule should not be of a general nature; the acceptor and the drawee should be included in paragraph (2) only if it could be demonstrated that there were situations where the acceptor and the drawee suffered damages because of the forgery of the payee's signature.

105. The Working Group, whilst agreed on the principle underlying paragraph (2), did not reach consensus on the scope of the provision and decided therefore to approve paragraph (2) provisionally.

Paragraph (3)

106. The question was raised whether a signature placed on the instrument by an agent without authority should be assimilated to a forged signature. The Working Group was generally agreed that an endorsee to whom the instrument had been endorsed by an agent

without authority should not in all circumstances be liable in the same way as an endorsee who took the instrument from a forger. However, the Group did not reach agreement on the kind of circumstances in which the person who sustained loss because of an unauthorized signature should be given a right to compensation.

107. The view was expressed that the issues which paragraph (3) sought to deal with were part of the general law of agency and could not satisfactorily be dealt with in a convention on negotiable instruments.

108. The Working Group, after discussion, decided to delete paragraph (3) provisionally. The Group requested the Secretariat to consider a redefinition of "forged signature" in article 5 (10) so as to include situations where a signature is placed on an instrument by a person without authority to sign who is not an employee or agent of the person he purports to represent. This redefinition should lead to the result, *inter alia*, that article 22 would apply in cases of actual forgery and in cases where a stranger who purported to be an agent signed without authority. On the other hand, article 22 should not apply where the signature is by an agent with general authority, but not with particular authority to sign the instrument.

109. The suggestion was made that the Secretariat, in considering these questions, should consult with the UNCITRAL Study Group on International Payments.

*D. Articles 23 and 24 (rights and liabilities)**"Article 23"*

"(1) The holder of an instrument has all the rights conferred on him by this law against any party to the instrument.

"(2) The holder is entitled to transfer the instrument in accordance with article 13."

110. The question was raised whether the words "any party", in paragraph (1), could be misconstrued in that there could be situations in which a party was not liable to the holder, e.g. when the bill had been paid and taken up by a prior party.

111. The Working Group decided that, in order to avoid any misunderstanding, the words "any party" should be replaced by "the parties".

112. Subject to this modification, the Working Group approved article 23.

"Article 24"

"(1) The rights to and upon an instrument of a holder who is not a protected holder are subject to:

"(a) Any valid claim to the instrument on the part of any person;

"(b) Any defence of any party which would be available as a defence to contractual liability or available under this law.

"(2) A party may not raise as a defence against a remote holder the fact that he has a defence against his immediate party if such defence is unrelated to the circumstances under which he became a party.

"(3) A party may not raise as a defence against a

holder the fact that a third person has a valid claim to the instrument unless such third person has himself claimed the instrument from the holder and informed such party of his claim."

Paragraph (1)

113. During the discussion of article 24 (1) the question was raised whether the drawer who draws a bill to himself can be a "protected holder". It was noted that under article 13 *bis* the drawer payee was a holder but that the definition of "protected holder" in the revised draft would prevent him from qualifying as a "protected holder".

114. The view was expressed that, if the payee was not capable of being a "protected holder", article 24 (1) should not preclude the application of a procedural law in a legal system under which a defence of the type mentioned in paragraph (1) (b) would not be available in an application for summary judgement. The Working Group expressed agreement with this view.

115. With respect to paragraph (1) (b), the Working Group considered the meaning of a "defence to contractual liability". The Working Group was agreed that such a defence referred to a defence available in a contractual relationship under the applicable law. Thus, if under such law the defence of fraud, duress, incapacity, mistake, etc., was available as a defence against contractual liability, such defence could also be set up against liability on the instrument against a holder who is not a protected holder. However, the view was expressed that the present wording of paragraph (1) (b) could give rise to misinterpretation and should be redrafted with greater clarity.

116. The proposal was made that the draft Convention should contain a provision under which, as between immediate parties, no distinction should be made between a holder and a protected holder: both should be subject to any defence set up by the immediate party. The status of protected holder would only become relevant where the defence against liability was set up by a remote party.

117. The Working Group decided to postpone a decision on this proposal until after it had considered the definition of "protected holder" and article 25 concerning the rights of a protected holder.

118. One observer expressed the view that paragraphs (2) and (3) of article 24 constituted exceptions to paragraph (1) (b) of that article and that, consequently, the article should be redrafted in order to achieve greater clarity.

FUTURE WORK

119. The Working Group requested the Secretariat to prepare a commentary to the revised text of the draft convention as amended and approved by the Working Group.

120. The Working Group decided to hold its sixth session at Geneva from 3 to 13 January 1978. The Working Group noted in this connexion that the Commission had approved these dates at its tenth session held at Vienna from 23 May to 17 June 1977.

ANNEX

Draft Convention on International Bills of Exchange and International Promissory Notes

(as adopted by the Working Group on International Negotiable Instruments at its fifth session, New York, 18-29 July 1977)

[PART ONE. SPHERE OF APPLICATION; FORM]*

Article 1

- (1) This Convention applies to international bills of exchange and to international promissory notes.
- (2) An international bill of exchange is a written instrument which
 - (a) Contains, in the text thereof, the words "international bill of exchange [Convention of . . .]";
 - (b) Contains an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to his order;
 - (c) Is payable on demand or at a definite time;
 - (d) Is dated;
 - (e) Shows that at least two of the following places are situated in different States
 - (i) The place where the bill is drawn;
 - (ii) The place indicated next to the signature of the drawer;
 - (iii) The place indicated next to the name of the drawee;
 - (iv) The place indicated next to the name of the payee;
 - (v) The place of payment;
 - (f) Is signed by the drawer.
- (3) An international promissory note is a written instrument which
 - (a) Contains, in the text thereof, the words "international promissory note [Convention of . . .]";
 - (b) Contains an unconditional promise whereby the maker undertakes to pay a definite sum of money to the payee or to his order;
 - (c) Is payable on demand or at a definite time;
 - (d) Is dated;
 - (e) Shows that at least two of the following places are situated in different States
 - (i) The place where the instrument was made;
 - (ii) The place indicated next to the signature of the maker;
 - (iii) The place indicated next to the name of the payee;
 - (iv) The place of payment;
 - (v) Is signed by the maker.
 - (f) Proof that the statements referred to in paragraph (2) (e) or (3) (e) of this article are incorrect does not affect the application of this Convention.

Article 2

(deleted)

Article 3

This Convention applies without regard to whether the places indicated on an international bill of exchange or on an international promissory note pursuant to paragraph (2) (e) or (3) (e) of article 1 are situated in contracting States.

[PART TWO. INTERPRETATION]

Article 4

In the interpretation and application of this Convention, regard is to be had to its international character and to the need to promote uniformity.

* Brackets indicate matters which the Working Group has reserved for further consideration at a later date.

Article 5

In this Convention

- (1) "Bill" means an international bill of exchange governed by this Convention;
- (2) "Note" means an international promissory note governed by this Convention;
- (3) "Instrument" means an international bill of exchange or an international promissory note governed by this Convention;
- (4) "Drawee" means the person on whom a bill is drawn but who has not accepted it;
- (5) "Payee" means the person in whose favour the drawer directs payment to be made or the maker promises to pay;
- (6) "Holder" means the person referred to in article 13 *bis*;
- (7) ["Protected holder" means a holder of an instrument which, when it came into his possession, was complete and regular on its face and not overdue, provided that, at that time, he was without actual knowledge of any claim to or defence upon the instrument or of the fact that it was dishonoured for non-acceptance or non-payment;]
- (8) ["Party" means a party to an instrument;]
- (9) ["Maturity" means the date of payment indicated on the instrument and, in the case of a demand bill, the date on which the instrument is first presented for acceptance or for payment;]
- (10) "Forged signature" includes a signature which is forged by the wrongful or unauthorized use of a stamp, symbol, facsimile, perforation or other means by which a signature may be made in accordance with article 27.

Article 6

(deleted)

[SECTION 2. INTERPRETATION OF FORMAL REQUIREMENTS]

Article 7

The sum payable by an instrument is deemed to be a definite sum although the instrument states that it is to be paid

- (a) With interest;
- (b) By instalments at successive dates;
- (c) By instalments at successive dates with the stipulation on the instrument that upon default in payment of any instalment the unpaid balance becomes due;
- (d) According to a rate of exchange indicated on the instrument or to be determined as directed by the instrument; or
- (e) In a currency other than the currency in which the amount of the instrument is expressed.

Article 8

(1) If there is a discrepancy between the amount of the instrument expressed in words and the amount expressed in figures, the sum payable is the amount expressed in words.

(2) If the amount of the instrument is expressed in a currency having the same description as that of at least one other State than the State where payment is to be made as indicated on the instrument and the specified currency is not identified as the currency of any State, the currency is to be considered as the currency of the State where payment is to be made.

(3) If an instrument states that it is to be paid with interest, without specifying the date from which interest is to run, interest runs from the date of the instrument.

(4) A stipulation on an instrument stating that it is to be paid with interest is to be disregarded unless it indicates the rate at which interest is to be paid.

Article 9

- (1) An instrument is deemed to be payable on demand
 - (a) If it states that it is payable on demand or at sight or on presentment or if it contains words of similar import; or
 - (b) If no time for payment is expressed.
- (2) An instrument payable at a definite time which is accepted or

endorsed or guaranteed after maturity is an instrument payable on demand as regards the acceptor, the endorser or the guarantor.

(3) An instrument is deemed to be payable at a definite time if it states that it is payable

- (a) On a stated date or at a fixed period after a stated date or at a fixed period after the date of the instrument; or
- (b) At a fixed period after sight, or
- (c) By instalments at successive dates; or
- (d) By instalments at successive dates with the stipulation on the instrument that upon default in payment of any instalment the unpaid balance becomes due.

(4) The time of payment of an instrument payable at a fixed period after date is determined by reference to the date of the instrument;

(5) The maturity of a bill payable at a fixed period after sight is determined by the date of the acceptance.

(6) [The maturity of a note payable at a fixed period after sight is determined by the date of the visa signed by the maker on the note or, if signature is refused, from the date of presentment.]

(7) Where an instrument is drawn, or made, payable at one or more months after a stated date or after the date of the instrument or after sight, the instrument matures on the corresponding date of the month when payment must be made. If there is no corresponding date, the instrument matures on the last day of that month.

Article 10

- (1) A bill may
 - (a) Be drawn upon two or more drawees,
 - (b) Be drawn by two or more drawers,
 - (c) Be payable to two or more payees.
- (2) A note may
 - (a) Be made by two or more makers,
 - (b) Be payable to two or more payees.
- (3) If an instrument is payable to two or more payees in the alternative, it is payable to any one of them and any one of them in possession of the instrument may exercise the rights of a holder. In any other case the instrument is payable to all of them and the rights of a holder can only be exercised by all of "them".

Article 10 bis

A bill may be drawn by the drawer on himself or be drawn payable to his order.

[SECTION 3. COMPLETION OF AN INCOMPLETE INSTRUMENT]

Article 11

(1) An incomplete instrument which satisfies the requirements set out in subparagraphs (a) and (f) of paragraph (2) or (a) and (f) of paragraph (3) but which lacks other elements pertaining to one or more of the requirements set out in paragraphs (2) or (3) of article 1 may be completed and the instrument so completed is effective as a bill or a note.

(2) When such an instrument is completed otherwise than in accordance with agreements entered into

(a) A party who signed the instrument before the completion may invoke the non-observance of the agreement as a defence against a holder or against any other person who exercises a right of recourse in accordance with article 68, provided such a person or holder has knowledge of the non-observance of the agreement.

(b) A party who signed the instrument after the completion is liable according to the terms of the instrument so completed.

[PART THREE. TRANSFER; HOLDER]

Article 12

(deleted)

Article 13

An instrument is transferred

- (a) By endorsement and delivery of the instrument by the endorser to the endorsee; or
- (b) By mere delivery of the instrument if the last endorsement is in blank.

New article

(to be inserted between article 13 and article 13 bis)

"(a) An endorsement must be written on the instrument or on a slip affixed thereto ('allonge'). It must be signed.

"(b) An endorsement may be made

- (i) In blank, that is, by a signature alone or by a signature accompanied by a statement to the effect that the instrument is payable to any person in possession thereof;
- (ii) Special, by a signature accompanied by an indication of the person to whom the instrument is payable."

Article 13 bis

- (1) A person is a holder if he is
 - (a) The payee in possession of the instrument; or
 - (b) In possession of an instrument
 - (i) Which has been endorsed to him; or
 - (ii) On which the last endorsement is in blank
- and on which there appears an uninterrupted series of endorsements, even if any of the endorsements was forged or was signed by an agent without authority.

(2) When an endorsement in blank is followed by another endorsement, the person who signed this last endorsement is deemed to be an endorsee by the endorsement in blank.

(3) A person is not prevented from being a holder by the fact that the instrument was obtained under circumstances, including incapacity or fraud, duress or mistake of any kind, that would give rise to a claim to, or to a defence upon the instrument.

Article 14

(deleted)

Article 15

The holder of an instrument on which the last endorsement is in blank may

- (a) Further endorse the instrument either in blank or to a specified person; or
- (b) Convert the blank endorsement into a special endorsement by indicating therein that the instrument is payable to himself or to some other specified person; or
- (c) Transfer the instrument in accordance with paragraph (b) of article 13.

Article 16

[When the drawer, the maker or an endorser has inserted in the instrument or in the endorsement such words as "not negotiable", "not transferable", "not to order", "pay (X) only", or words of similar import, the transferee does not become a holder except for purposes of collection.]

Article 17

- (1) (Deleted)
- (2) A conditional endorsement transfers the instrument irrespective of whether the condition is fulfilled.
- (3) A claim to or a defence upon the instrument based on the fact

that the condition was not fulfilled may not be raised except by the party who endorsed conditionally against his immediate transferee.

Article 18

An endorsement in respect of a part of the sum due under the instrument is ineffective as an endorsement.

Article 19

When there are two or more endorsements, it is presumed, unless the contrary is established, that each endorsement was made in the order in which it appears on the instrument.

Article 20

(1) When an endorsement contains the words "for collection", "for deposit", "value in collection", "by procuration", "pay any bank", or words of similar import, authorizing the endorsee to collect the instrument (endorsement for collection), the endorsee

- (a) May only endorse the instrument for purposes of collection;
 - (b) May exercise all the rights arising out of the instrument;
 - (c) Is subject to all claims and defences which may be set up against the endorser.
- (2) The endorser for collection is not liable upon the instrument to any subsequent holder.

Article 21

The holder of an instrument may transfer it to a prior party or the drawee in accordance with article 13; nevertheless, in the case where the transferee was a prior holder of the instrument, no endorsement is required and any endorsement which would prevent him from qualifying as a holder may be struck out.

Article 21 bis

An instrument may be transferred in accordance with article 13 after maturity, except by the drawee, the acceptor or the maker.

Article 22

(1) If an endorsement is forged the person whose endorsement is forged has against the forger and against the person who took the instrument directly from the forger the right to recover compensation for any damage that he may have suffered because of the forgery.

(2) [The drawer or maker of the instrument has a similar right to compensation in circumstances where damage is caused to him by the forgery of the signature of the payee.]

(3) (Deleted provisionally)

[PART FOUR. RIGHTS AND LIABILITIES]

[SECTION I. THE RIGHTS OF A HOLDER AND A PROTECTED HOLDER]

Article 23

- (1) The holder of an instrument has all the rights conferred on him by this Convention against the parties to the instrument.
- (2) The holder is entitled to transfer the instrument in accordance with article 13.

B. Report of the Working Group on International Negotiable Instruments on the work of its sixth session (Geneva, 3-13 January 1978) (A/CN.9/147)*

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INTRODUCTION

1. In response to decisions by the United Nations Commission on International Trade Law (UNCITRAL), the Secretary-General prepared a "Draft Uniform Law on International Bills of Exchange and International Promissory Notes, with commentary" (A/CN.9/WG.IV/WP.2).¹ At its fifth session (1972), the Commission established a Working Group on International Negotiable Instruments. The Commission requested that the above draft uniform law be submitted to the Working Group and entrusted the Working Group with the preparation of a final draft.²

2. The Working Group held its first session in Geneva in January 1973. At that session the Working Group considered articles of the draft uniform law relating to transfer and negotiation (articles 12 to 22), the rights and liabilities of signatories (articles 27 to 40), and the definition and rights of a "holder" and a "protected holder" (articles 5, 6 and 23 to 26).³

3. The second session of the Working Group was held in New York in January 1974. At that session the Working Group continued consideration of articles of the draft uniform law relating to the rights and liabilities of signatories (articles 41 to 45) and considered articles in respect of presentment, dishonour and recourse, including the legal effects of protest and notice of dishonour (articles 46 to 62).⁴

4. The third session was held in Geneva in January 1975. At that session the Working Group continued its consideration of the articles concerning notice of dishonour (articles 63 to 66). The Group also considered provisions regarding the sum due to a holder and to a party secondarily liable who takes up and pays the instrument (articles 67 and 68) and provisions regarding the circumstances in which a party is discharged of his liability (articles 69 to 78).⁵

5. The fourth session of the Working Group was held in New York in February 1976. At that session the Working Group considered articles 79 to 86 and articles 1 to 11 of the draft uniform law, thereby completing its first reading of the draft text of that law.⁶

6. At the fifth session of the Working Group, held in New York in July 1977, the Working Group commenced its second reading of the draft uniform law (retitled at that session "draft convention on international bills of exchange and international promissory notes") and considered articles 1 to 24.⁷

¹ UNCITRAL, report on the fourth session (1971), para. 35 (Yearbook... 1971, part one, II, A). For a brief history of the subject up to the fourth session of the Commission, see A/CN.9/53, paras. 1 to 7; UNCITRAL, report on the fifth session (1972), para. 61 (2) (c) (Yearbook... 1972, part one, II, A).

² UNCITRAL, report on the fifth session (1972), para. 61 (1) (a).

³ Report of the Working Group on International Negotiable Instruments on the work of its first session (Geneva, 8-19 January 1973), A/CN.9/77 (Yearbook... 1973, part two, II, D).

⁴ Report of the Working Group on the work of its second session (New York, 7-18 January 1974), A/CN.9/86 (Yearbook... 1974, part two, II, D).

⁵ Report of the Working Group on the work of its third session (Geneva, 6-17 January 1975), A/CN.9/99 (Yearbook... 1975, part two, II, D).

⁶ Report of the Working Group on the work of its fourth session (New York, 2-12 February 1976), A/CN.9/117 (Yearbook... 1976, part two, II, 1).

7. The Working Group held its sixth session at the United Nations Office at Geneva from 3 to 13 January 1978. The Working Group consists of the following eight members of the Commission: Egypt, France, India, Mexico, Nigeria, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America. With the exception of Egypt, all the members of the Working Group were represented at the sixth session. The session was also attended by observers of the following States: Australia, Austria, Brazil, Chile, Colombia, Cuba, Ecuador, Germany, Federal Republic of, Ghana, Japan, Pakistan, Panama, Philippines, Syrian Arab Republic, Thailand, Trinidad and Tobago, Turkey and Uruguay, and by observers from the European Banking Federation, the European Economic Community and the Hague Conference on Private International Law.

8. The Working Group elected the following officers:

Chairman..... Mr. René Roblot (France)
Rapporteur..... Mr. Roberto Luis Mantilla-Molina (Mexico)

9. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.8); draft uniform law on international bills of exchange and international promissory notes, with commentary (A/CN.9/WG.IV/WP.2); draft uniform law on international bills of exchange and international promissory notes (first revision) (A/CN.9/WG.IV/WP.6 and Add. 1 and 2); draft Convention on international bills of exchange and international promissory notes (first revision) articles 5, 6, 24 to 45, as reviewed by a drafting party (A/CN.9/WG.IV/WP.9); and the respective reports of the Working Group on the work of its first (A/CN.9/77), second (A/CN.9/86), third (A/CN.9/99), fourth (A/CN.9/117) and fifth (A/CN.9/141) sessions.

DELIBERATIONS AND DECISIONS

10. At the present session the Working Group continued its second reading of the text of the draft Convention on International Bills of Exchange and International Promissory Notes as revised by the Secretariat on the basis of the deliberations and decisions of the Working Group as recorded in its reports on the work of its five previous sessions.

11. The text of each article as revised appears at the beginning of the report on the deliberations relative to that article.

12. In the course of this session, the Working Group considered articles 5 and 6 and articles 24 to 53. The text of the articles as approved, or deferred for further consideration, by the Working Group is set forth in the annex to this report.

13. At the close of its session, the Working Group expressed its appreciation to the observers of Member States of the United Nations and to representatives of international organizations who had attended the session. The Group also expressed its appreciation to the representatives of international banking and trade organizations that are members of the UNCITRAL Study Group on International Payments for the assistance they had given to the Group and the Secretariat. The

⁷ Report of the Working Group on the work of its fifth session (New York, 18-29 July 1977), A/CN.9/141 (reproduced in the present volume, part two, II, A above).

Working Group expressed the hope that the members of the Study Group would continue to make their experience and services available during the remaining phases of the current project.

A. Articles 5 and 6 (interpretation)

"Article 5

"(7) 'Protected holder' means a holder of an instrument which, when he became a holder, was complete and regular on its face and not overdue, provided that, at that time, he was without knowledge of any claim to or defence upon the instrument referred to in article 24 or of the fact that it was dishonoured by non-acceptance or non-payment."

"Article 6

"For the purposes of this Convention, a person is considered to have knowledge of a fact if he has actual knowledge of that fact or could not have been unaware of its existence."

14. The Working Group adopted these articles.

15. It was noted that, under the definition of protected holder, a party who, having received an incomplete instrument (e.g., it was not dated) inserted a date could not qualify as a protected holder even if he inserted the true date.

B. Articles 24 to 26 (rights of holder; protected holder)

"Article 24

"(1) The rights to and upon an instrument of a holder who is not a protected holder are subject to:

"(a) Any valid claim to the instrument on the part of any person;

"(b) Any defence available under this Convention;

"(c) Any defence to contractual liability which is related to the circumstances under which the person raising the defence became a party.

"(2) A party may not raise as a defence against a holder the fact that a third person has a valid claim to the instrument unless such third person has himself claimed the instrument from the holder and informed such party of his claim."

16. The Working Group, after deliberation, decided to subdivide paragraph (1) into two separate paragraphs relating to defences and claims respectively. This new arrangement of paragraph (1) is reflected in paragraph (1) (defences) and paragraph 2 (claims) of article 24 as set out in the annex to this report.

Paragraph (1), subparagraph (a)

17. The Working Group adopted this provision in substance.

Paragraph (1), subparagraph (b)

18. The Working Group adopted this provision.

19. The Group noted that the defences to which a

holder who is not a protected holder is subject under this provision were based on provisions in the Convention itself. The following examples were given:

(i) Where a bill had not been duly protested for dishonour by non-acceptance or by non-payment, parties prior to the holder, other than the acceptor and his guarantor, were discharged (art. 60) and, if sued on the bill, could raise the defence of discharge consequent upon the lack of due protest.

(ii) Where the drawer had stipulated on the bill that it be presented for acceptance and the bill had not been so presented, he would have against the holder exercising a recourse against him for non-payment the defence that he was not liable because of the lack of due presentment for acceptance (art. 50).

(iii) Where an instrument had been materially altered subsequent to the drawee having accepted the bill, e.g. by raising the sum payable from Sw.F. 1,000 to Sw.F. 10,000, the acceptor was liable to a holder who took it after the alteration for Sw.F. 1,000 (art. 29) and could therefore set up a defence against liability for the remaining Sw.F. 9,000 based on that provision of the Convention.

(iv) A party could oppose to the holder a defence based on article 79 on the ground that the holder's action on the instrument was time-barred.

Paragraph (1), subparagraph (b)

20. Various comments were made concerning this subparagraph and the Working Group considered a number of proposals designed to define the defences which could be set up against a non-protected holder.

21. There was general agreement that one type of defence to which both the holder and the non-protected holder should be subject were the defences of parties with whom the holder had dealt and which were based on the underlying transaction, as in the following case. The seller of goods draws a bill of exchange on the buyer payable to himself. The bill is accepted by the buyer. The drawer fails to deliver. The buyer-acceptor may raise a defence based on the non-delivery of the goods.

22. The Working Group was also agreed that the non-protected holder should be subject to a defence based on an underlying transaction raised by a party with whom such holder had not dealt. The following example was given. Pursuant to the contract of sale, the buyer (maker) issues a note payable to the seller (payee). The seller fails to deliver and endorses the note to A who is not a protected holder. The maker can interpose the defence of non-delivery of the goods in an action on the note by A.

23. The question was raised whether the wording of subparagraph (c) which referred to defences to contractual liability which are "related to the circumstances under which the person raising the defence became a party" covered the case where a latent defect in the underlying transaction came to light after a person had become a party. The Working Group was of the view that, in the example given under paragraph 7 above, the buyer should be entitled to raise the non-

performance of the contract by the seller as a defence against A, even though that defence did not exist at the moment when the buyer, when signing the note as a maker, became a party.

24. The Working Group considered the question whether a party against whom an action on the instrument was brought should be permitted to raise against a non-protected holder a defence based on an unrelated transaction. For instance, if the acceptor from whom the holder claimed payment had a claim against that holder based on a transaction not in any way related to the instrument, should the acceptor be permitted to raise that claim by way of a defence against his liability on the bill? The Working Group, after considerable discussion, was agreed that article 24 should set forth a provision to that effect, but that such a defence could only be raised as between immediate parties.

25. The Working Group was agreed that for the sake of clarity, there should be added to the defences to which a holder was open a paragraph on "real" defences, e.g., those based on incapacity or absence of conduct which rendered the liability of the party sued on the instrument null and void.

26. The Working Group established a drafting party composed of the representatives of France, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America to redraft article 24 in the light of the Group's discussions and conclusions. The Group adopted the text proposed by the drafting party, with slight amendments, as set forth in annex I to this report.

Paragraph (2)

27. The Working Group failed to reach consensus on the retention of this provision, under which the defence of the party from whom payment is claimed is based on the claim of a third person to the instrument (*ius tertii*). Under the provision, where X has, by fraud, induced the payee to endorse the bill, accepted by A, to him, and X presents the bill to A for payment, A could set up the defence based on fraud against X, if P had claimed the bill from X and informed A of his claim. The suggestion was made that, for the purposes of the rule, it should not be necessary that P had claimed the bill from X but that it sufficed that P had informed A of his claim.

28. The Working Group decided to revert to this provision in connexion with article 70, in view of the fact that it related to the question whether a party paying the instrument under the circumstances described in paragraph 12 above should be considered as discharged.

"Article 25"

"(1) The rights to and upon an instrument of a protected holder are free from

"(a) Any claim to the instrument on the part of any person;

"(b) Any defence of any party, except defences based on incapacity or absence of consent rendering the liability of that party on the instrument null and void; and

"(c) Any defence based on the absence of liability

on the ground that the instrument was not duly presented for acceptance or for payment, or that the dishonour of the instrument was not duly protested.

"(2) The rights of a protected holder are not free from any claim to or a defence to liability upon the instrument arising from a transaction between himself and the party by whom the claim or the defence is raised if that transaction is related to the circumstances under which he became a holder.

"[(3) The transfer of an instrument by a protected holder vests in any subsequent holder the rights to and upon the instrument which the protected holder had, except where such subsequent holder participated in a transaction which gives rise to a claim to or a defence upon the instrument.]"

Paragraph 1, subparagraph (a)

29. The Working Group adopted this provision in substance.

Paragraph 1, subparagraph (b)

30. The Working Group noted that the defences referred to in this provision concerned the so-called "real" or "absolute" defences. The Group was agreed that the protected holder should be subject to such defences even if they were set up by a remote party, i.e., by a party whose legal relations as a party to the instrument did not arise out of direct dealings with the protected holder but out of dealings with another party to the instrument or, in the case of an intervening transfer of the instrument by mere delivery, with the person who so transferred the instrument. The Group was, however, of the view that the proposed wording of the provision should be modified along the lines of paragraph 1 (b) of article 25, as redrafted originally by the Secretariat, as follows: "Defences based on the incapacity of such party to incur liability on the instrument or on the fact that such party signed without knowledge that his signature made him a party to the instrument, provided that such absence of knowledge was not due to negligence."

Paragraph 1, subparagraph (c)

31. The Working Group considered a proposal that article 25 should set forth a provision under which the protected holder would be subject to defences based on the Convention. For instance, a party sued on the instrument should be able to set up against a protected holder the defence based on article 79, i.e., that the action on the instrument was time-barred. The Group was agreed in principle that such a provision should be added to article 25 and requested the Secretariat to prepare, in time for the seventh session, a draft paragraph setting out the defences derived from the Convention which can be opposed to a protected holder.

Paragraph (2)

32. The Working Group noted that this provision concerned the defences which a party could set up against a protected holder if they arose from a transaction between himself and the protected holder. The Group considered three possible solutions:

(a) The protected holder should be free from any defences except "real" defences;

(b) In addition to "real" defences, the protected holder should be subject to defences based on the underlying transaction;

(c) In addition to the defences listed under (b), the protected holder should also be subject to defences based on transactions other than the one by reason of which he became a holder.

33. The Working Group was agreed that the defences which could be set up against a protected holder should exclude defences based on unrelated transactions. The Group did not retain the suggestion that a defence based on the underlying transaction could be raised only if the underlying transaction had been annulled. One representative expressed the opinion that defences based on unrelated transactions could be set up against a protected holder.

Paragraph (3)

34. The Working Group agreed to this provision. It was noted that the so-called "shelter rule" was not intended to permit a person who had participated in a transaction which gave rise to a claim or defence to wash the instrument clean by transferring it to a holder. Thus, if a payee, by fraud, induced the drawer to issue a bill to him and endorsed the bill to A who is a protected holder, and A endorsed the bill to B who had participated in the fraud, B could not rely on the fact that he acquires the bill from a protected holder.

35. The Working Group established a drafting party composed of the representatives of France, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America for the purpose of drafting appropriate wording based on the conclusions reached by the Group.

36. The text of article 25, as set out between brackets in the annex to this report, was provisionally approved pending reconsideration of subparagraph (1) (c) of the text set out above and of the provision contained in subparagraph (1) (a) of the text set out in the annex to be submitted by the Secretariat at the seventh session.

C. Articles 27 to 45 (liability of the parties)

"Article 27"

"(1) Subject to the provisions of articles 28 and 30, a person is not liable on an instrument unless he signs it.

"(2) A person who signs in a name which is not his own is liable as if he had signed it in his own name.

"(3) A signature may be in handwriting or by facsimile, perforations, symbols or any other mechanical means."

Paragraph (1)

37. The Working Group adopted this paragraph.

Paragraph (2)

38. The Working Group adopted this paragraph.

Paragraph (3)

39. The view was expressed with respect to this paragraph that, in that it would permit signatures by facsimile or other mechanical means, it would go against the rule in certain jurisdictions which recognized only handwritten signatures. The proposal was accordingly made that such a State, upon signing, ratifying or acceding to the Convention, be permitted to make a declaration to the effect that article 27, paragraph 3, does not apply to any signature placed on an instrument by a party having his place of business in a State which had made such a declaration. It was recalled in this connexion that a similar provision had been included in the text of the draft Convention on the International Sale of Goods approved by the Commission at its tenth session.⁸

40. After discussion of this proposal, the Working Group adopted the following text, to be added as a foot-note to the paragraph:

"Article X"

"A Contracting State whose legislation requires that signatures on an instrument be handwritten may, at the time of signature, ratification or accession, make a declaration to the effect that signatures placed on an international bill of exchange or an international promissory note by a legal or physical person of the Contracting State must be in handwritten form."

"Article 28"

"A forged signature on an instrument does not impose any liability thereon on the person whose signature was forged. Nevertheless, such person is liable as if he had signed the instrument himself where he has, expressly or impliedly, accepted to be bound by the forged signature or represented that the signature was his own."

41. The question was raised with respect to this article whether it would also cover the case of an agent who signed the instrument although he had no authority to do so. The view was generally expressed that the intent of this article was not to regulate the agency situation although it was, of course, not inconceivable that someone who was an agent could commit forgery, as by signing the principal's name without indicating that he was signing as agent.

42. The Working Group adopted this provision.

"Article 29"

"(1) If an instrument has been materially altered

"(a) Parties who have signed the instrument subsequent to the material alteration are liable thereon according to the terms of the altered text.

"(b) Parties who have signed the instrument before the material alteration are liable thereon according to the terms of the original text. Nevertheless a party who has himself made, authorized or assented to the material alteration is liable on the instrument according to the terms of the altered text.

⁸ UNCITRAL, report on the tenth session (A/32/17), para. 134 (Yearbook . . . 1977, part one, II, A).

"(2) Failing proof to the contrary, a signature is deemed to have been placed on the instrument after the material alteration.

"(3) Any alteration is material which modifies the written undertaking on the instrument of any party in any respect."

Paragraph (1), subparagraph (a)

43. The Working Group adopted this subparagraph.

Paragraph (1), subparagraph (b)

44. Doubts were raised concerning the correctness of this provision. It was noted that the provision could be read as binding a party to a material alteration on the basis of an implied assent, which was undesirable. Concern was also expressed as to the seeming rigidity of the rule as applied to parties who sign after a material alteration and its possible harshness in factual situations. The example was given of a note for \$1,000 made by A in favour of B. B endorses the note to C who, having raised the amount of the note to \$4,000, endorses it to D. D, unaware of the alteration, endorses to E. In the meantime C has absconded or is without means. E, upon dishonour of the note by A, will be able to collect the full amount of \$4,000 from D, but D, who also is innocent, can proceed against B only for \$1,000 even though he may have relied primarily on B's prior endorsement in taking the note in the first place.

45. The Working Group was of the opinion that this kind of hardship was unavoidable in a system which must distribute the risk of loss. The underlying principle of the system elaborated in the draft text was "know your endorser" and it would completely alter the basic concepts of the draft to change the result in the example given.

46. The Working Group decided to retain the text of this subparagraph as drafted, noting, however, that the French text was incorrect in that it seemed to refer only to alterations made by a party and not, for instance, by a total stranger.

Paragraphs (2) and (3)

47. The Working Group adopted each of these two paragraphs.

"Article 30

"(1) An instrument may be signed by an agent.

"(2) The name or signature of a principal placed on the instrument by an agent with his authority imposes liability on the principal and not on the agent.

"(3) The signature of an agent placed by him on an instrument without authority, or with authority to sign but not showing on the instrument that he is signing in a representative capacity for a named person, or showing on the instrument that he is signing in a representative capacity but not naming the person whom he represents, imposes liability thereon on such agent and not on the person whom the agent purports to represent.

"(4) The question whether a signature was placed on the instrument in a representative capacity

may be determined only by reference to what appears on the face of the instrument.

"(5) An agent who is liable pursuant to paragraph 3 and who pays the instrument has the same rights as the person for whom he purported to act would have had if that person had paid the instrument."

Paragraphs (1), (2) and (3)

48. The Working Group adopted each of these paragraphs.

Paragraph (4)

49. It was pointed out that the reference in this paragraph to what appears on "the face of" the instrument was ambiguous in that it might be read to refer only to what appears on the front of the instrument. The Working Group decided to delete from this paragraph the words "the face of", so that the reference would simply be to "what appears on the instrument". The Working Group adopted the paragraph, subject to this change.

Paragraph (5)

50. The Working Group adopted this paragraph.

"Article 30 bis

"The order to pay contained in a bill does not of itself operate as an assignment of a right to payment existing outside of the bill."

51. The Working Group adopted this article.

"Article 34

"(1) The drawer engages that upon dishonour of the bill by non-acceptance or non-payment, and upon any necessary protest, he will pay to the holder the amount of the bill, and any interest and expenses which may be recovered under article 67 or 68.

"(2) The drawer may exclude or limit his own liability by an express stipulation on the bill. Such stipulation has effect only with respect to the drawer."

Paragraphs (1) and (2)

52. The Working Group adopted each of these paragraphs of the article.

Article 34 bis

"(1) The maker engages that he will pay to the holder the amount of the note, and any interest and expenses which may be recovered under article 67 or 68.

"(2) The maker may not exclude or limit his own liability by a stipulation on the note. Any such stipulation is without effect."

Paragraphs (1) and (2)

53. The Working Group adopted each of these two paragraphs of article 34 bis.

"Article 36"

"(1) The drawee is not liable on a bill until he accepts it.

"(2) The acceptor engages that he will pay to the holder, or the drawer who has paid the bill, the amount of the bill, and any interest and expenses which may be recovered under article 67 or 68."

Paragraphs (1) and (2)

54. The Working Group adopted each of these two paragraphs of article 36.

"Article 37"

"An acceptance must be written on the bill and may be affected

"(a) By the signature of the drawee accompanied by the word 'accepted' or by words of similar import, or

"(b) By the signature alone of the drawee, but only if placed on the front of the bill."

Paragraph (a)

55. The Working Group adopted this paragraph.

Paragraph (b)

56. The point was made with regard to this paragraph that the requirement that the drawee's signature appear on the front of the bill was unnecessary and out of tune with current practice in a number of countries where it was not uncommon for a drawee to indicate his acceptance on the back of the instrument. Furthermore, since a drawee seldom had reason to sign an instrument except upon his acceptance, it was reasonable to conclude that such a signature appearing anywhere in the instrument was an acceptance unless a contrary indication were given. The view was expressed, however, that the requirement under consideration was in accord with the Geneva Uniform Law and could serve a useful purpose in distinguishing an acceptance from a mere guarantee, especially in the case of a blank endorsement appearing as part of a series of endorsements on the back of the bill.

57. The Working Group decided to delete from this paragraph the words "but only if placed on the front of the bill", on the premise that, barring an indication to the contrary, the signature of a drawee appearing anywhere on the instrument should be construed as an acceptance.

"Article 38"

"(1) A bill may be accepted

"(a) Before it has been signed by the drawer, or while otherwise incomplete;

"(b) Before, at or after maturity, or after it has been dishonoured by non-acceptance or non-payment.

"(2) When a bill drawn payable at a fixed period after sight is accepted, the acceptor must indicate the date of his acceptance; failing such indication by the

acceptor, the drawer, before the issue of the bill, or the holder may insert the date of acceptance.

"(3) If a bill drawn payable at a fixed period after sight is dishonoured by non-acceptance and the drawee subsequently accepts it, the holder is entitled to have the acceptance dated as of the date on which the bill was dishonoured."

Paragraph (1) subparagraph (a)

58. A question was raised as to the appropriateness of using the word "bill" in this provision in view of the fact that a "bill" is defined in article 1 paragraph (2) as an instrument which, among other prerequisites, is "signed by the drawer". It was also suggested that the wording of the provision could leave the impression that an "acceptance" could be given on a blank piece of paper which is then subsequently converted into a bill by insertion of the appropriate words in accordance with article 1.

59. The Working Group was of the view that this provision should apply only in the case of an instrument which by the time it came to the drawee already met some of the prerequisites of a bill specified in article 1 (2). Accordingly, the Group decided to redraft this paragraph as follows:

"(1) An incomplete instrument which satisfies the requirements set out in subparagraph (a) of paragraph (2) of article 1 may be accepted by the drawee before it has been signed by the drawer or while otherwise incomplete;"

Paragraph (1) subparagraph (b)

60. The Working Group adopted this provision. Two representatives, however, expressed their reservation with respect to the possibility that a bill may be accepted "at or after maturity".

Paragraph (2)

61. It was proposed that since under article 46 (2) (a) a bill must be presented for acceptance if it bears a stipulation to that effect, it would be advisable to include a reference to such bills in this provision.

62. The Working Group retained this proposal and inserted the words "or when it must be presented for acceptance before a specified date" after the word "sight" in the first line of paragraph (2).

Paragraph (3)

63. The Working Group adopted this paragraph.

"Article 39"

"(1) An acceptance must be unconditional. If the drawee stipulates on the bill that his acceptance is subject to a condition, the bill is dishonoured. Nevertheless, the acceptor is bound according to the terms of his conditional acceptance.

"(2)(a) The holder may refuse an acceptance which varies the terms of the bill. Upon such refusal, the bill is dishonoured by non-acceptance. If the holder takes an acceptance relating to only a part of the amount of the bill, the bill is dishonoured for

non-acceptance as to the remaining part of the amount.

"(b) If the holder takes an acceptance which varies the terms of the bill, other than an acceptance relating to only a part of the amount of the bill, any party who does not affirmatively assent to the variation is discharged of liability on the bill.

"(3) An acceptance indicating that payment will be made by an agent does not vary the terms of the bill, provided that:

"(a) The place in which payment is to be made is not changed, and

"(b) The bill is not drawn payable by another agent.

64. The Working Group considered what would be the proper terminology to be used to describe an acceptance which was not a general acceptance, i.e., an acceptance by which the drawee did not assent without qualification to the drawer's order. It was noted that the original Secretariat draft of article 39 used the term "qualified acceptance" and defined such an acceptance as: conditional, partial, qualified as to place and qualified as to time. The view was expressed that the term "unconditional", although used in article 26 of the Geneva Uniform Law, was too restrictive in that it could be interpreted to refer only to those acceptances which stated that payment will be dependent upon the fulfilment of a condition stated in the acceptance. The Group, after deliberation, concluded that the words "qualified" and "unqualified" reflected more correctly all kinds of acceptance which were not general acceptances. The Group accordingly decided to adopt a new paragraph (1), as follows:

"An acceptance must be unqualified. An acceptance is qualified if it is conditional or varies the terms of the bill."

It was noted that an acceptance which "varies the terms of the bill" included:

- (i) A partial acceptance, i.e., an undertaking on the part of the drawee to pay part only of the amount for which the bill is drawn;
- (ii) A local acceptance, i.e., an acceptance to pay only at a particular specified place other than the place of payment as determined by article 53 (g) of the draft Convention;
- (iii) An acceptance qualified as to time, i.e., to pay at a time which differs from the time at which the bill is drawn payable.

Paragraph (1)

65. The Working Group agreed with the provision that a qualified acceptance, even if it were not taken by the holder, would nevertheless bind the drawee according to its terms.

Paragraph (2)

66. The Working Group agreed with the provision that the holder had the option between taking a partial acceptance or refusing to take such an acceptance. In the latter case, the bill was considered to be dishonoured. If the holder took the partial acceptance, the bill

was considered to be dishonoured for the remaining part of the amount.

67. The Working Group was agreed that any qualified acceptance, other than a partial acceptance which the holder took, should be considered as a dishonour of the bill. Consequently, if the holder took, for instance, an acceptance which was qualified as to time, prior parties and the drawer would be discharged of liability on the bill by reason of the fact that, since there was a dishonour, the holder should have drawn up a protest.

Paragraph (3)

68. There was considerable discussion about the meaning of the "place" of payment. The conclusion was reached that, provided the locality where payment is to be made, is not varied, an acceptance which indicates a particular address in that locality or an address different from the one specified on the bill, but in the same locality, was not a qualified acceptance. The same conclusion was reached with respect to an acceptance stating that payment is to be made by a particular agent: such an acceptance is not qualified, provided the locality where payment is to be made is not changed and the bill is not drawn payable by another agent.

69. The text, as adopted by the Working Group, is set out in the annex to this report.

"Article 41

"(1) The endorser engages that upon dishonour of the instrument by non-acceptance or non-payment, and upon any necessary protest, he will pay to the holder the amount of the instrument, and any interest and expenses which may be recovered under article 67 or 68.

"(2) The endorser may exclude or limit his own liability by an express stipulation on the instrument. Such stipulation has effect only with respect to that endorser."

Paragraphs (1) and (2)

70. The Working Group adopted these two paragraphs of article 41.

"Article 42

"(Alternative A)

"[(1) Any person who transfers an instrument by mere delivery is liable to any holder subsequent to himself for any damages that such holder may suffer on account of the fact that prior to such transfer

"(a) A signature on the instrument was forged or unauthorized; or

"(b) The instrument was materially altered; or

"(c) A party has a valid claim or defence against him; or

"(d) The bill is dishonoured by non-acceptance or non-payment or the note is dishonoured by non-payment.

"(2) The damages according to paragraph (1) may not exceed the amount referred to in article 67 or 68.

"(3) Liability on account of any defect mentioned in paragraph (1) is incurred only to a holder who took the instrument without knowledge of such defect.]

"(Alternative B)

"[(1) Any person who transfers an instrument by mere delivery is liable to any holder subsequent to himself for any damages that such holder may suffer on account of the fact that prior to such transfer

"(a) A signature on the instrument was forged or unauthorized; or

"(b) The instrument was materially altered; or

"(c) A party has a valid claim or defence against him; or

"(d) The bill is dishonoured by non-acceptance or non-payment or the note is dishonoured by non-payment.

"(2) The damages according to paragraph (1) may not exceed the amount referred to in article 67 or 68.

"(3) Liability on account of any defect mentioned in paragraph (1) is incurred only to a holder who took the instrument without knowledge of such defect.

"(4) Paragraph (1) does not apply where the instrument is transferred by an endorsement for collection in accordance with article 20.

"(5) A person who transfers an instrument without knowledge that liability under paragraph (1) is incurred by him, may exclude or limit such liability. If such exclusion or limitation is by an express stipulation on the instrument, it is effective as against any subsequent holder. Such stipulation is effective only with respect to the person making it.

"(6) Liability under paragraph (5) is excluded by the use of the words 'without liability', 'without guarantee', or words of similar import. However, the use of the words 'without recourse' does not exclude liability under paragraph (1).]"

71. The Working Group considered whether the draft Convention should contain a provision under which a person who had not signed the instrument, and therefore was not a party, should be liable to any subsequent holder. The following example was given: B, the payee of a note, endorses the note in blank and delivers it to C. C delivers the note to D without signing it. Should C be liable for any damages which D may suffer because of, say, a material alteration of the note made after B signed the note?

72. It was noted that civil law and common law countries took a different approach to the matter dealt with by article 42. In civil law jurisdictions the liability of C in the above example would be a matter for general law, whereas in the common law jurisdictions such liability was based on the concept of warranties. In opposition to the proposed provision, it was observed that it would be against the policy underlying the draft Convention if a liability outside the instrument were established. However, under a contrary view, a provision along the lines of article 42 was necessary in common law jurisdictions in order to ensure that a holder who

had received the instrument by mere delivery was not left without legal remedy in the circumstances contemplated by article 42. Moreover, even in civil law jurisdictions, it was doubtful whether, if the instrument had been further delivered, subsequent holders would have, under the general law, an action for damages against a remote holder who had transferred the instrument by mere delivery.

73. The Working Group, after deliberation, was agreed to include in the draft Convention a provision along the lines of article 42.

Alternative A

Paragraph (1)

74. The Working Group adopted this paragraph.

Paragraph (2)

75. Two examples were given with respect to the damages which a holder could recover under this provision. Firstly, the case was put of a note for Sw.F. 1,000, made by A to B. B endorses the note in blank and delivers it to C, who alters the sum payable to Sw.F. 11,000. C then delivers it to D who is entitled to receive from A or B the sum of Sw.F. 1,000 only. Under article 42, D may recover from C Sw.F. 10,000.

76. The second example concerned the extent to which a holder, such as D in the example given, must first pursue his rights on the instrument against A and B before he could avail himself of the right against C conferred under article 42. The Group was agreed that the issue had to be decided under the ordinary principles of the law of damages, including the duty of mitigation thereof which required only that effective but not extraordinary steps be first taken to obtain satisfaction from the primary obligors. It was, therefore, suggested that D in the example given needed only to make presentment to A, not sue him, before he could go against D.

77. It was also observed in connexion with the interpretation of article 42 that a person is liable for any damages which the holder has suffered "on account of" the factors enumerated in paragraph (1) as to which alone the transferor's warranty runs. Consequently, the insolvency, for example, of the primary obligors would not confer a right of action under article 42 on the transferee by mere delivery, since the transferor is not deemed under the article to have warranted the solvency of such primary obligors. The Working Group agreed with this interpretation and adopted paragraph (2).

Paragraph (3)

78. The Working Group adopted this paragraph.

Alternative B

79. The Working Group considered the question whether the provisions of paragraphs (4), (5) and (6) of alternative B of article 42 should be incorporated in the draft text. Although the view was advanced that it might be useful to retain the substance of paragraph (4) in the draft in order to clarify the position of a bank which makes a transfer by delivery during the process

of collection, the Working Group decided that paragraph (4) would in practice only be relevant in cases of transfer by endorsement and was accordingly not required in article 42. The Working Group for the same reason decided not to adopt paragraph (5) or paragraph (6) of alternative B.

"Article 43"

"[(1) Payment of an instrument may be guaranteed, as to the whole or part of its amount, by any person, who may or may not have become a party.]

"[(1) The liability of a party on an instrument may be guaranteed by any person who may or may not have become a party.]

"(2) A guarantee must be written on the instrument or on a slip affixed thereto (*"allonge"*).

"(3) A guarantee is expressed by the words: 'guaranteed', *'aval'*, 'good as *aval*' or words of similar import, accompanied by the signature of the guarantor.

"(4) A guarantee may be effected by a signature alone. However,

"(a) The signature alone of the drawee on the front of the instrument is an acceptance; and

"(b) A signature alone on the back of the instrument is an endorsement if it can be so construed from the face of the instrument.

"(5) A guarantor may specify the person for whom he has become guarantor. In the absence of such specification, the person for whom he has become guarantor is the drawer, in the case of a bill, and the maker, in the case of a note."

Paragraph (1)

80. The Working Group first considered which of the alternative formulations of paragraph (1) was to be preferred, the issue being the possibility that one may become a guarantor for the drawee of a bill who may or may not subsequently assume an obligation on the bill by accepting it. It was observed in this regard that if the possibility of guaranteeing such a putative obligation of the drawee was to be excluded from the draft Convention, then the second alternative of paragraph (1) could be admitted; the first alternative, on the other hand, was designed to embrace the possibility that the person for whom the person signing intends to become guarantor is the drawee, as where there appears on a bill, against the name of the drawee, the words "payment guaranteed" followed by the guarantor's signature.

81. The Working Group, after considerable discussion of alternative I, decided to admit, in principle, of the possibility of such a guarantee on behalf of the drawee and to accept the first formulation of paragraph (1) as the basis for its discussion as to the appropriate wording for such a rule.

82. In considering whether to adopt a formulation of the kind "Payment or acceptance of an instrument may be guaranteed, etc.", the Working Group discussed the nature of the guarantor's undertaking in the guarantee of acceptance situation. It was generally agreed that in purporting to become guarantor for the

drawee, the person signing could not be undertaking to get the named drawee actually to accept the bill, since this might well be physically impossible; nor would he be undertaking himself to accept the bill, should the drawee fail to do so, since, under the draft Convention, only the drawee can accept a bill. On the other hand, the undertaking must mean more than an assurance simply that the drawee will put his signature on the bill as acceptor with no intention or ability to pay the bill when due.

83. The Working Group accordingly concluded that, in the final analysis, the undertaking of one who becomes a guarantor for the drawee of a bill is to pay the bill when due should the drawee not do so. Hence, it was not very helpful and could be misleading to employ the "guarantee of acceptance" wording in the text. It would be preferable to refer explicitly to the drawee.

84. The proposal was made, and adopted by the Working Group, to redraft paragraph (1) of article 43 as follows:

"(1) Payment of an instrument, whether or not it has been accepted, may be guaranteed, as to the whole or part of the amount, for the account of any party or the drawee. A guarantee may be given by any person who may or may not be a party."

It was explained that the words "for the account of any party" were not meant to lay down a rule as to the form in which the guarantee must be expressed. It was rather intended to relate the guarantee to the obligation (existing or putative) of a specific person (e.g. the drawee) while avoiding express reference to such obligation and to refer to the informal relation between the guarantor and such person.

Paragraph (2)

85. The Working Group adopted this paragraph.

Paragraph (3)

86. The Working Group adopted this paragraph.

Paragraph (4)

87. The Working Group was generally agreed that the rules as to the location of signatures on the instrument enunciated in paragraph (4) should operate as strong but nevertheless rebuttable presumptions. Accordingly, the Group decided to amend the opening of the second sentence of this paragraph by substituting for the word "However" the words "Unless the context otherwise requires".

Paragraph (4), subparagraph (a)

88. The Working Group decided to delete from this subparagraph the words "the front of" so as to conform this provision with the earlier decision of the Group regarding acceptance (see art. 37 (b) above, para. 57).

Paragraph (4), subparagraph (b)

89. In the light of the change referred to in paragraph 87 above, the Working Group decided to delete from this subparagraph, as redundant, the words "if it can be so construed from the face of the instrument."

Paragraph (4), new subparagraph

90. The Working Group decided, for the sake of completeness, to adopt the following presumption for the case of a signature alone on the front of the instrument, not being that of the drawer or the drawee:

"The signature alone on the front of the instrument of a person other than the drawer or the drawee is a guarantee."

The foregoing provision would become subparagraph (a) of paragraph (4), the present subparagraphs (a) and (b) being renumbered (b) and (c) respectively.

Paragraph (5)

91. The main issue discussed by the Working Group with regard to this paragraph was whether in the absence of a specification as for whom the person signing has become guarantor, the guarantee should be deemed to be provided for the drawer or the drawee. There was general agreement, however, that where the bill is accepted, such an unspecified guarantee should be deemed to be given for the acceptor. The only issue was as to an unaccepted bill.

92. A strong argument was made in favour of treating such a signature as a guarantee of the drawer's liability. It was argued that the notion of a guarantee for a liability (the drawee's) which did not already exist and might possibly never exist, was juridically difficult to comprehend. What, under article 45, were the rights of such a guarantor? It was further observed that the rule under the Geneva Uniform Law was that such a guarantee was deemed to be given for the drawer, a party who had liability on the bill, and that one should not depart from such established régime except for very good reasons, which did not appear to exist in the present case.

93. In support of the position that the person for whom the unspecified guarantee is provided should be the drawee, it was noted that there were practical reasons for such a solution even if the conceptual difficulties were granted. Firstly, in the case of sight drafts, which were of major importance in commercial practice, the holder was usually interested in the guarantee because no acceptance was involved and consequently his interest would be that there be a guarantee for the drawee and not the drawer. Secondly, given the decision that upon acceptance the guarantee would be deemed to be for the acceptor, it would lead to practical problems of verification if the guarantee was deemed to be for the drawer and not the drawee in the case of a not-yet-accepted bill. It would become necessary in every case of an accepted bill to determine whether the guarantor's signature was placed on the bill before or after that of the drawee. If it was placed before that of the drawee, then the person for whom he became guarantor would be the drawer, and if after, the acceptor. It was also observed that the relevant provision of article 31 of the Geneva Uniform Law, despite its seeming rigidity, was, in some civil law countries, construed as a rebuttable presumption.

94. The Working Group decided to amend paragraph (5) by substituting for the word "drawer" in the last line the words "acceptor or the drawee", and on that basis adopted the text of the paragraph.

"Article 44"

"A guarantor is liable on the instrument to the same extent as the party for whom he has become guarantor, unless the guarantor has stipulated otherwise on the instrument."

95. The Working Group was agreed that in view of the decision to admit of the possibility of a person becoming a guarantor for the drawee who has not yet accepted the bill and is, therefore, not liable on it (see paras. 91 to 94, above), it was necessary to spell out in the article the nature of such a guarantor's undertaking. Recalling its earlier discussion of the issue in connexion with paragraph (1) of article 43 (see paras. 80 and 81, above), and the conclusion there reached, the Working Group decided to make the present text of article 44 into paragraph (a) and to adopt the following provision as a new paragraph (b) of that article:

"If the person for whom he has become guarantor is the drawee, the guarantor undertakes to pay the bill, when due, if the drawee does not pay or does not accept and pay the bill."

96. With respect to the foregoing formulation, the Working Group agreed that the effect of the words "when due" should be to make the guarantor liable to pay the bill at the time when the drawee, had he agreed to be bound on the instrument, would have had to pay the bill, and not before.

97. The Working Group then considered a number of questions relating to the interpretation and effect of article 44 as a whole. The Working Group came to the conclusion that the effect of article 44 was to put the guarantor in the shoes of the person for whom he has become guarantor with the consequence that the guarantor is liable only to the extent that such a person is or would have been. A corollary of this was that the guarantor may raise against any person the defences which the person for whom he has become guarantor could have raised. The Working Group decided that it was outside of the scope of the draft Convention to attempt to deal with the issue of the guarantor's own personal defences independent of those of the person for whom he has become guarantor. In response to a question whether, in order to go against a guarantor, the holder must first make protest, it was pointed out that under draft articles 55 (3) and 60 (3) (A/CN.9/WG.IV/WP.10) which the Working Group had still to consider, presentment and protest are dispensed with as regards the liability of the acceptor's or maker's guarantor.

98. The Working Group adopted article 44, including the new paragraph (b) referred to in paragraph (1) above.

"Article 45"

"The guarantor who pays the instrument has rights thereon against the party for whom he became guarantor and against parties who are liable thereon to that party."

99. The Working Group expressed general agreement with the text of article 45. It was noted that the only situation not covered referred to the rights of the drawee's guarantor against a drawer who did not become a party and concluded that any action that might be taken would be outside of the bill and, therefore, should not be addressed in the Convention. A

question was, however, raised as to whether the mere use of the word "party" was sufficient to emphasize the qualitative difference between the rights of a guarantor where the drawee has accepted the bill and where he has not.

100. The Working Group decided not to make any change in the wording of the text of article 45 and adopted the article.

D. Articles 46 to 51 (presentment for acceptance)

"Article 46

"(1) The holder may present a bill for acceptance.

"(2) The holder must present a bill for acceptance

"(a) When the drawer [or an endorser or a guarantor] has stipulated on the bill that it must be so presented; or

"(b) When the bill is drawn payable at a fixed period after sight; or

"(c) When the bill is drawn payable elsewhere than at the habitual residence or place of business of the drawee [, except where such a bill is payable on demand].

"[(3) A stipulation on the bill that it must be accepted,

"(a) If made by the drawer, is effective in respect of the drawer and any subsequent party, unless such party has stipulated otherwise on the bill;

"(b) If made by any party other than the drawer, is personal to the party making it.]

Paragraph (1)

101. The view was expressed that the wording of this paragraph was unduly restrictive to the extent that it seemed to contemplate presentment for acceptance by the holder alone. This could raise unnecessary doubts in cases where presentment is made, not by the holder himself, but by someone acting on his behalf, such as, for example, a bank, a messenger or even the drawer himself. Furthermore, it was unnecessary for the purposes of the paragraph to say who should make presentment since the paragraph dealt only with the question whether or not a bill may be presented for acceptance. Attention was also drawn to the case of the drawer who might present an incomplete instrument for acceptance under article 38 (1).

102. The Working Group decided, in view of the foregoing observation, to redraft paragraph (1) as follows:

"A bill may be presented for acceptance."

Paragraph (2)

103. The Working Group decided that the opening line of this paragraph should be redrafted to conform with the new wording of paragraph (1).

Paragraph (2), subparagraph (a)

104. The Working Group decided to delete the words in brackets from this subparagraph on the ground that it was inadvisable to introduce the attendant com-

plexity in the absence of evidence that there was a significant practice of endorsers or guarantors stipulating with regard to presentment. The Working Group would, however, reconsider the matter should inquiries among banking and commercial circles by the Secretariat reveal a practical need to provide for such cases. The Working Group also decided that the words "so presented" in the English text should be replaced by the words "presented for acceptance", so that the subparagraph would now read as follows:

"(a) When the drawer has stipulated on the bill that it must be presented for acceptance;"

Paragraph (2), subparagraph (b)

105. The Working Group adopted this subparagraph.

Paragraph (2), subparagraph (c)

106. The Working Group considered whether the word "habitual" before the word "residence" should be deleted. The view was expressed, on the one hand, that to delete "habitual" would complicate the predicament of the holder who might well know the habitual residence of a drawee but not know whether the other place specified on the bill is also a residence. There was no particular problem in most instances of identifying the habitual residence of a person and the concept was well known in international legislation. It was, however, argued that a holder in the international transaction should not be put in the difficult position of having to decide the issue of "habitual" and "non-habitual" residence of a drawee. It should suffice for the purposes of subparagraph (c) that the bill is drawn payable elsewhere than at any of the residences of the drawee: deleting "habitual" would accomplish this result. The Working Group decided to delete the word "habitual" in the first line of subparagraph (c), it being recognized that the cases where this would make a practical difference in results were very few.

107. The Working Group also considered a proposal to delete subparagraph (c) entirely. It imposed the requirement of presentment in a case where it was not necessary and had the undesirable consequence that non-compliance with its requirements would discharge the endorsers of a bill. The Working Group decided to retain this subparagraph in view of the fact that such a provision was necessary in Anglo-American negotiable instruments practice, in order to put the drawee on notice that such a bill had been issued.

108. The Working Group, recalling that it had earlier decided not to make an exception in the case of a demand bill, also decided to remove the brackets around the words "except where such a bill is payable on demand".

Paragraph (3)

109. The Working Group decided to delete this provision in light of the decision taken on the issue of endorsers and guarantors in connexion with paragraph (2) (a) (see para. 104 above).

"Article 47

"(1) The drawer [or an endorser or a guarantor] may stipulate on the bill that it must not be presented

for acceptance or that it must not be so presented before a specified date or before the occurrence of a specified event.

"(2) If a bill is presented for acceptance notwithstanding a stipulation as permitted under paragraph (1) and acceptance is refused, the bill is not thereby dishonoured [in respect of the party making the stipulation].

"(3) If the drawee accepts a bill notwithstanding a stipulation that it must not be presented for acceptance, the acceptance is effective.

"[(4) A stipulation on the bill that it must not be presented for acceptance

"(a) If made by the drawer, is effective with respect to any subsequent party, unless such party has stipulated otherwise on the bill;

"(b) If made by any other party, is personal to the party making it.]"

Paragraph (1)

110. The Working Group adopted this paragraph subject to deletion of the words between brackets in accordance with its decision regarding endorser and guarantors in connexion with article 46 (2) (a) (see para. 104 above).

Paragraph (2)

111. It was observed that the word "stipulation" was inapposite in this context when translated into Spanish and French; the more correct notion was that of a prohibition.

112. The Working Group decided to adopt the text of this paragraph subject to substituting a better term for "stipulation" in the French and Spanish texts. It was also decided to delete the material in brackets at the end of the paragraph in line with the decision in respect of endorser and guarantors in article 46 (2) (a) (see para. 104 above).

Paragraph (3)

113. The Working Group adopted this paragraph.

Paragraph (4)

114. The Working Group decided to delete this paragraph in the light of its decision not to provide for stipulations by endorser or guarantors in connexion with article 46 (2) (a) (see para. 104 above).

"Article 47 bis

"(1) Presentment for acceptance must be made to the drawee.

"(2) A bill drawn upon two or more drawees may be presented to any one of them, unless the bill clearly indicates otherwise.

"(3) Presentment for acceptance may be made to a person or authority other than the drawee if that person or authority is entitled under the applicable law to accept the bill."

Paragraph (1)

115. It was recalled that during its consideration of

paragraphs (1) and (2) of article 46, the Working Group had decided that questions relating to who may make presentment for acceptance and to whom, should be dealt with elsewhere than in that article. The Working Group was also agreed that, unlike in the Geneva Uniform Law (art. 21) which permits any person merely in possession to make presentment, there should be some restriction as to who may make due presentment under the draft Convention. The Group accordingly decided to amend the text of paragraph (1) to read as follows:

"(1) Presentment for acceptance must be made to the drawee by or on behalf of the holder of the drawer."

Paragraph (2)

116. The Working Group adopted this paragraph.

Paragraph (3)

117. In response to a question as to the scope and application of this provision, it was observed that the provision was intended to cover some of the following situations: bankruptcy of the drawee; liquidation of a body corporate; incapacity of the drawee by reason of insanity; and so forth. It was also pointed out that such a provision was necessary in some jurisdictions in order to make it clear that the persons or authority therein referred to could give a valid acceptance in their own right unrelated to the question whether they were or were not acting "on behalf of" the drawee.

118. The Working Group adopted this paragraph.

"Article 48

"A bill is duly presented for acceptance if it is presented in accordance with the following rules:

"(a) The holder must present the bill to the drawee on a business day at a reasonable hour. Where a place of acceptance is specified in the bill, presentment must be made at that place.

"(b) If a bill is drawn payable on, or at a fixed period after, a stated date, presentment for acceptance must be made before or on the date of maturity.

"(c) A bill drawn payable at a fixed period after sight must be presented for acceptance within one year of its date.

"(d) A bill in which the drawer [or an endorser or a guarantor] has stated a date or time-limit for presentment for acceptance must be presented on the stated date or within the stated time-limit."

Paragraph (a)

119. The Working Group adopted this paragraph.

Paragraph (b)

120. The Working Group decided to substitute, in the first line of this paragraph, "a fixed date" for "or at a fixed period after a stated date" on the ground that "a fixed period after a stated date" was also a fixed date. The Working Group adopted the paragraph subject to this change.

Paragraph (c)

121. The observation was made on this provision

that it did not seem to cover a bill payable at sight on which there was a stipulation for acceptance. The Working Group was agreed that such a bill should be embraced within this provision and adopted a proposal to insert the words "sight or at" before the words "a fixed period" in the first line of the paragraph, so that the sentence would now read as follows:

"A bill drawn payable at sight or at a fixed period after sight must . . ."

122. The Working Group also considered, but did not adopt, a proposal to reduce the length of the period available for making presentment of a bill subject to paragraph (c). It was noted in this connexion that the business world had become accustomed to the one-year rule provided under the Geneva Uniform Law and it was unnecessary to create the risk that people might get caught unawares by the shorter period.

123. The Working Group adopted this paragraph subject to the amendment referred to in paragraph 121 above.

Paragraph (d)

124. In response to the question whether the present provision took due account of the possibility of making presentment by post, the view was generally expressed that the wording did not exclude such a possibility. The fact that it contained no specific provisions relating to lost or misdelivered mail should not, it was observed, lead to the conclusion that presentment by mail was to be ruled out.

125. On the foregoing understanding, and subject to deletion of the words within brackets as earlier decided, the Working Group adopted this paragraph.

"Article 49"

"[(1) Delay in making presentment for acceptance is excused when the delay is caused by circumstances beyond the control of the holder and which he could neither avoid nor overcome. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.]

"(2) Presentment for acceptance is dispensed with

"(a) If the drawee is dead or has no longer the power freely to deal with his assets by reason of his insolvency, or is a fictitious person or a person not having capacity to accept the bill, or if the drawee is a corporation, partnership, association or other legal entity which, under the applicable law, is in liquidation or has ceased to exist;

"(b) When, with the exercise of reasonable diligence, presentment cannot be effected within the time-limits prescribed for presentment for acceptance.

"[(b) When the cause of delay referred to in paragraph (1) of this article continues to operate beyond 30 days after the expiration of the time-limit for presentment for acceptance.]"

Paragraph (1)

126. The Working Group decided to delete this provision from the text of the draft Convention on the ground that it was vague and difficult of application

and, therefore, likely to lead to divergent interpretations. Its deletion, furthermore, should not lead to any hardship since for the most part the same result could be arrived at by invoking paragraph (2) (b).

Paragraph (2), subparagraph (a)

127. In response to a question as to the relationship between this provision and article 47 *bis* (3) under which presentment for acceptance may be made to a person or authority other than the drawee, who is entitled to accept the bill, it was observed that although article 49 (2) (a) dispenses with presentment in such circumstances, a holder may nevertheless wish to make presentment and the person or authority be willing to make acceptance. The effect of article 47 *bis* (3) was to permit and recognize such a presentment.

128. A question was raised as to the concept of "a fictitious person". It was pointed out, firstly, that in many civil law countries the term was apt to involve the doctrine of corporate personality as distinguished from natural persons, and, secondly, that, to the extent the terms referred to non-existent drawees, the rule of dispensing with presentment in such a case was unsound in principle. It was never possible to determine at first sight that a drawee was fictitious simply because the name suggested so. It was only by going to the specified place of presentment that one would be able to determine the existence or non-existence of the drawee. The effect of the provision, therefore, was to dispense with presentment in precisely the case where presentment should be required.

129. It was pointed out, on the other hand, that the provision served a useful practical purpose. It was not uncommon for promoters and entrepreneurs to obtain value from third parties by representing that a company or enterprise which had not yet been formed and might never be in existence was actively in and carrying out a certain line of business. Bills of exchange might then be drawn on such fictitious companies. Dispensing with presentment in such a case would not only avoid the logical difficulty of how presentment can be made to a non-existent person, but would also permit rights on the instruments of and against parties, such as endorser, to crystallize at a determinable time. As regards the necessity to make enquiries before one could conclude that the drawer is fictitious, it was pointed out that this was not a problem peculiar to the fictitious person provision. The same factual and/or legal determination was called for in order to apply the provision relating, for instance, to the incapacity of the drawee, or even that relating to the drawee's death.

130. The Working Group decided to retain the reference to non-existent drawees in this subparagraph.

131. The Working Group decided to substitute the words "incur liability on the instrument as acceptor" for "accept the bill" in the third line of this paragraph so as to bring the reference in line with the terminology employed in articles 24 and 25. It was also decided to delete, as unnecessary, the words "under the applicable law" from the fourth line of the subparagraph.

132. With regard to the reference in the subparagraph to a legal entity "in liquidation", it was observed that under many legal systems the fact of being "in liquidation" did not affect the capacity of an entity to accept or its ability to pay an instrument. Further-

more, the state of being "in liquidation" had many different meanings and legal consequences from one legal system to another so that it was not a workable basis for a uniform rule. The Working Group, accordingly, decided to delete the words "is in liquidation or" from the subparagraph on the understanding that it is open for a court to interpret the words "has no longer the power freely to deal with his assets by reason of his insolvency" or "not having capacity to accept the bill" at the beginning of the subparagraph to cover the case of an entity "in liquidation".

133. The Working Group adopted this subparagraph subject to the foregoing changes.

Paragraph (2), subparagraph (b)

134. The Working Group adopted this subparagraph.

"Article 50"

"If a bill which must be presented for acceptance in accordance with article 46 is not so presented, the drawer, the endorsers and the guarantors are not liable on the bill."

135. The Working Group adopted this provision subject to the following modifications:

- (i) The words "in accordance with article 46" were deleted because the reference to the mandatory presentment for acceptance under article 46 might be construed as not taking into account the cases in which presentment was dispensed with. For instance, if there was no presentment because the drawee is dead, the drawer, the endorsers and their guarantors would not be discharged, although the bill was a bill drawn payable at a fixed period after sight.
- (ii) The words "the guarantors" were changed into "their guarantors" because the guarantor of the drawee would remain liable on the bill since he guaranteed payment by the drawee.

"Article 51"

"(1) A bill is considered to be dishonoured by non-acceptance

"(a) When, upon due presentment, acceptance is expressly refused or cannot, with reasonable diligence, be obtained;

"(b) When the holder cannot obtain the acceptance to which he is entitled under this Convention;

"(c) If presentment for acceptance is dispensed with pursuant to article 49, and the bill is not accepted.

"(2) If a bill is dishonoured by non-acceptance the holder may, subject to the provisions of article 57, exercise an immediate right of recourse against the drawer, the endorsers and the guarantors."

Paragraph (1), subparagraphs (a) and (b)

136. The Working Group reworded these provisions into one paragraph as set out in the annex to this report.

Paragraph (1), subparagraph (c)

137. It was observed that the words "and the bill is

not accepted" appeared to contradict the fact that presentment for acceptance was dispensed with. It was noted that these words were intended to cover the situation where notwithstanding the dispensation the bill was presented and accepted. The Working Group therefore modified these words to read as follows: "unless the bill is in fact accepted".

Paragraph (2)

138. The Working Group amended this provision by replacing the words "the guarantors" by "their guarantors" in order to make clear that the guarantors concerned were only those who guaranteed the liability of the drawer and the endorsers, and not the payment by the drawee.

E. Article 53 (presentment for payment)

"Article 53"

"An instrument is duly presented for payment if it is presented in accordance with the following rules:

"(a) The holder must present the instrument to the drawee or to the acceptor or to the maker on a business day at a reasonable hour.

"(b) A bill drawn upon or accepted by two or more drawees, or a note signed by two or more makers, may be presented to any one of them, unless the bill or note clearly indicates otherwise.

"(c) If the drawee or the acceptor or the maker is dead, [and no place of payment is specified,] presentment must be made to the persons who under the applicable law are his heirs or the persons entitled to administer his estate.

"[(d) If the drawee or the acceptor or the maker is in the course of insolvency proceedings, presentment must be made to a person who under the applicable law is authorized to act in his place.]

"(e) An instrument which is not payable on demand must be presented for payment on the date of maturity or on one of the two business days which follow.

"(f) An instrument which is payable on demand must be presented for payment within one year of its date.

"(g) An instrument must be presented for payment:

"(i) At the place of payment specified on the instrument; or

"(ii) If no place of payment is specified, at the address of the drawee or the acceptor or the maker indicated on the instrument; or

"(iii) If no place of payment is specified and the address of the drawee or the acceptor or the maker is not indicated, at the principal place of business or habitual residence of the drawee or the acceptor or the maker."

139. The Working Group requested the Secretariat to rearrange the paragraphs of this article in a more logical order.

Paragraph (a)

140. The Working Group adopted this provision.

Paragraph (b)

141. The Working Group adopted this provision.

Paragraph (c)

142. The Working Group noted that, in the case of presentment for acceptance, the holder could consider the bill as dishonoured in the event of the death of the drawee. The rationale of that rule was that the acceptance was personal to the drawee. However, the holder, if he so wished, could present the bill for acceptance to the deceased drawee's heirs. In the case of presentment for payment, the death of the drawee, the acceptor or the maker did not dispense the holder of presentment, since payment was not personal to the drawee, the acceptor or the maker and, accordingly, there was need for a provision stating to whom presentment must be made in that event. The Group therefore retained the provision.

143. The Working Group decided to delete the words "and no place of payment is specified" on the ground that, in all circumstances, presentment was to be made to the deceased's heirs or to the persons entitled to administer his estate, who should be given the opportunity to pay the instrument out of the estate.

Paragraph (d)

144. The Working Group noted that the fact that the drawee, the acceptor or the maker were in the course of insolvency proceedings should, under article 54, dispense the holder of presentment for payment. Consequently, the holder should have an immediate right of recourse against the drawer or previous endorsers and their guarantors. However, there might be circumstances in which the holder wished to present the instrument for payment and the Convention should therefore contain a provision stating to whom, in such circumstances, the holder should then make presentment. Accordingly, the Group adopted the following text in replacement of paragraph (d) as it appears above:

(d) Presentment for payment may be made to a person or authority other than the drawee, the acceptor or the maker if that person or authority is entitled under the applicable law to pay the instrument."

Paragraphs (e), (f) and (g)

145. The Working Group adopted these provisions.

OTHER DECISIONS

146. The Working Group decided to recommend to the Commission that the next (seventh) session of the Working Group be held in New York from 3 to 12 January 1979.

147. The Working Group also decided to set up a drafting group consisting of representatives of the four working languages of the Commission (English, French, Russian and Spanish) to review the text of the draft Convention on International Bills of Exchange and International Promissory Notes as finally adopted by the Working Group so as to ensure the internal consistency of the text and harmony between the various language versions. On the assumption that the Working Group shall have then concluded its consid-

eration of the text, the first meeting of the drafting group was scheduled to take place directly after the Working Group's seventh session.

ANNEX

Draft Convention on International Bills of Exchange and International Promissory Notes

(Text of articles 5 and 6 and 24 to 53 as adopted by the Working Group on International Negotiable Instruments at its sixth session, held at Geneva from 3 to 13 January 1978)

Article 5

(7) "Protected holder" means a holder of an instrument which, when he became a holder, was complete and regular on its face and not overdue, provided that, at that time, he was without knowledge of any claim to or defence upon the instrument referred to in article 24 or of the fact that it was dishonoured by non-acceptance or non-payment.

Article 6

For the purposes of this Convention, a person is considered to have knowledge of a fact if he has actual knowledge of that fact or could not have been unaware of its existence.

Article 24

(1) A party may set up against a holder who is not a protected holder:

- (a) Any defence available under this Convention;
 - (b) Any defence based on an underlying transaction between himself and the drawer or a previous holder or arising from the circumstances as a result of which he became a party;
 - (c) Any defence to contractual liability based on a transaction between himself and the holder;
 - (d) Any defence based on incapacity of such party to incur liability on the instrument or on the fact that such party signed without knowledge that his signature made him a party to the instrument, provided that such absence of knowledge was not due to negligence;
- (2) The rights to an instrument of a holder who is not a protected holder are subject to any valid claim to the instrument on the part of any person.

[(3) A party may not raise as a defence against a holder who is not a protected holder the fact that a third person has a claim to the instrument unless he had been informed by such a person of that claim.*]

Article 25

(1) A party may not set up against a protected holder any defence except:

- (a) Defences under articles . . . of this Convention;**
- (b) Defences based on the incapacity of such party to incur liability on the instrument;
- (c) Defences based on the fact that such party signed without knowledge that his signature made him a party to the instrument, provided that such absence of knowledge was not due to his negligence.

(2) Except as provided in paragraph (3), the rights to an instrument of a protected holder are not subject to any claim to the instrument on the part of any person.

(3) The rights of a protected holder are not free from any valid

* This paragraph to be reconsidered in connexion with article 70.

** The Working Group requested the Secretariat to identify the defences under this subparagraph and to indicate the corresponding provisions in the draft Convention.

claim to, or any defence to liability upon, the instrument arising from the underlying transaction between himself and the party by whom the claim or defence is raised or arising from any fraudulent act on the part of such holder in obtaining the signature on the instrument of that party.

(4) The transfer of an instrument by a protected holder vests in any subsequent holder the rights to and upon the instrument which the protected holder had, except where such subsequent holder participated in a transaction which gives rise to a claim to or a defence upon the instrument.

Article 26

Every holder is presumed to be a protected holder, unless the contrary is proved.

SECTION 2. LIABILITY OF THE PARTIES

[A. General]

Article 27

(1) Subject to the provisions of articles 28 and 30, a person is not liable on an instrument unless he signs it.

(2) A person who signs in a name which is not his own is liable as if he had signed it in his own name.

(3) A signature may be in handwriting or by facsimile, perforations, symbols or any other mechanical means.*

Article 28

A forged signature on an instrument does not impose any liability thereon on the person whose signature was forged. Nevertheless, such person is liable as if he had signed the instrument himself where he has, expressly or impliedly, accepted to be bound by the forged signature or represented that the signature was his own.

Article 29

(1) If an instrument has been materially altered

(a) Parties who have signed the instrument subsequent to the material alteration are liable thereon according to the terms of the altered text.

(b) Parties who have signed the instrument before the material alteration are liable thereon according to the terms of the original text. Nevertheless a party who has himself made, authorized, or assented to, the material alteration is liable on the instrument according to the terms of the altered text.

(2) Failing proof to the contrary, a signature is deemed to have been placed on the instrument after the material alteration.

(3) Any alteration is material which modifies the written undertaking on the instrument of any party in any respect.

Article 30

(1) An instrument may be signed by an agent.

(2) The name or signature of a principal placed on the instrument by an agent with his authority imposes liability on the principal and not on the agent.

(3) The signature of an agent placed by him on an instrument without authority, or with authority to sign but not showing on the instrument that he is signing in a representative capacity for a named person, or showing on the instrument that he is signing in a representative capacity but not naming the person whom he represents, imposes liability thereon on such agent and not on the person whom the agent purports to represent.

Article X

A Contracting State whose legislation requires that a signature on an instrument be handwritten may, at the time of signature, ratification or accession, make a declaration to the effect that a signature placed on an instrument in its territory must be executed in handwriting.

(4) The question whether a signature was placed on the instrument in a representative capacity may be determined only by reference to what appears on the instrument.

(5) An agent who is liable pursuant to paragraph 3 and who pays the instrument has the same rights as the person for whom he purported to act would have had if that person had paid the instrument.

Article 30 bis

The order to pay contained in a bill does not of itself operate as an assignment of a right to payment existing outside of the bill.

Article 31

(deleted)

Article 32

(deleted)

Article 33

(deleted)

[B. The drawer]

Article 34

(1) The drawer engages that upon dishonour of the bill by non-acceptance or non-payment, and upon any necessary protest, he will pay to the holder the amount of the bill, and any interest and expenses which may be recovered under article 67 or 68.

(2) The drawer may exclude or limit his own liability by an express stipulation on the bill. Such stipulation has effect only with respect to the drawer.

[C. The maker]

Article 34 (bis)

(1) The maker engages that he will pay to the holder the amount of the note, and any interest and expenses which may be recovered under article 67 or 68.

(2) The maker may not exclude or limit his own liability by a stipulation on the note. Any such stipulation is without effect.

[D. The drawee and the acceptor]

Article 35

(deleted)

Article 36

(1) The drawee is not liable on a bill until he accepts it.

(2) The acceptor engages that he will pay to the holder, or the drawer who has paid the bill, the amount of the bill, and any interest and expenses which may be recovered under article 67 or 68.

Article 37

An acceptance must be written on the bill and may be effected:

(a) By the signature of the drawee accompanied by the word "accepted" or by words of similar import, or

(b) By the signature alone of the drawee.

Article 38

(1) An incomplete instrument which satisfies the requirements set out in article 1 (2) (a) may be accepted by the drawee before it has been signed by the drawer, or while otherwise incomplete.

(2) A bill may be accepted before, at or after maturity, or after it has been dishonoured by non-acceptance or non-payment.

(3) When a bill drawn payable at a fixed period after sight, or a bill which must be presented for acceptance before a specified date, is accepted, the acceptor must indicate the date of his acceptance; failing such indication by the acceptor, the drawer, before the issue of the bill, or the holder may insert the date of acceptance.

(4) If a bill drawn payable at a fixed period after sight is dishonoured by non-acceptance and the drawee subsequently accepts it, the holder is entitled to have the acceptance dated as of the date on which the bill was dishonoured.

Article 39

(1) An acceptance must be unqualified. An acceptance is qualified if it is conditional or varies the terms of the bill.

(2) If the drawee stipulates on the bill that his acceptance is subject to qualification:

(a) He is nevertheless bound according to the terms of his qualified acceptance;

(b) The bill is dishonoured by non-acceptance, except that the holder may take an acceptance relating to only a part of the amount of the bill. In that case, the bill is dishonoured by non-acceptance as to the remaining part of the amount.

(3) An acceptance indicating that payment will be made at a particular address or by a particular agent is not a qualified acceptance, provided that:

(a) The place in which payment is to be made is not changed;

(b) The bill is not drawn payable by another agent.

Article 40

(deleted)

[E. The endorser]

Article 41

(1) The endorser engages that upon dishonour of the instrument by non-acceptance or non-payment, and upon any necessary protest, he will pay to the holder the amount of the instrument, and any interest and expenses which may be recovered under article 67 or 68.

(2) The endorser may exclude or limit his own liability by an express stipulation on the instrument. Such stipulation has effect only with respect to that endorser.

Article 42

(Alternative A)

(1) Any person who transfers an instrument by mere delivery is liable to any holder subsequent to himself for any damages that such holder may suffer on account of the fact that prior to such transfer

(a) A signature on the instrument was forged or unauthorized; or

(b) The instrument was materially altered; or

(c) A party has a valid claim or defence against him; or

(d) The bill is dishonoured by non-acceptance or non-payment or the note is dishonoured by non-payment.

(2) The damages according to paragraph (1) may not exceed the amount referred to in article 67 or 68.

(3) Liability on account of any defect mentioned in paragraph (1) is incurred only to a holder who took the instrument without knowledge of such defect.

[F. The guarantor]

Article 43

(1) Payment of an instrument, whether or not it has been accepted, may be guaranteed, as to the whole or part of its amount, for the account of a party or the drawee, by any person, who may or may not have become a party. A guarantee may be given by any person who may or may not be a party.

(2) A guarantee must be written on the instrument or on a slip affixed thereto ("allonge").

(3) A guarantee is expressed by the words: "guaranteed", "aval", "good as aval" or words of similar import, accompanied by the signature of the guarantor.

(4) A guarantee may be effected by a signature alone. Unless the content otherwise requires

(a) The signature alone on the front of the instrument, other than that of the drawer or the drawee, is a guarantee.

(b) The signature alone of the drawee on the front of the instrument is an acceptance; and

(c) A signature alone on the back of the instrument other than that of the drawee is an endorsement.

(5) A guarantor may specify the person for whom he has become guarantor. In the absence of such specification, the person for whom he has become guarantor is the acceptor or the drawee in the case of a bill, and the maker, in the case of a note.

Article 44

(1) A guarantor is liable on the instrument to the same extent as the party for whom he has become guarantor, unless the guarantor has stipulated otherwise on the instrument.

(2) If the person for whom he has become guarantor is the drawee, the guarantor undertakes to pay the bill when due, if the drawee does not pay or does not accept and pay the bill.

Article 45

The guarantor who pays the instrument has rights thereon against the party for whom he became guarantor and against parties who are liable thereon to that party.

PART FIVE. PRESENTMENT, DISHONOUR AND RECOURSE

SECTION I. PRESENTMENT FOR ACCEPTANCE

Article 46

(1) A bill may be presented for acceptance.

(2) A bill must be presented for acceptance:

(a) When the drawer has stipulated on the bill that it must be presented for acceptance;

(b) When the bill is drawn payable at a fixed period after sight; or

(c) When the bill is drawn payable elsewhere than at the residence or place of business of the drawee, except where such a bill is payable on demand.

Article 47

(1) The drawer may stipulate on the bill that it must not be presented for acceptance or that it must not be so presented before a specified date or before the occurrence of a specified event.

(2) If a bill is presented for acceptance notwithstanding a stipulation permitted under paragraph (1) and acceptance is refused, the bill is not thereby dishonoured.

(3) If the drawee accepts a bill notwithstanding a stipulation that it must not be presented for acceptance, the acceptance is effective.

Article 47 bis

(1) Presentment for acceptance must be made to the drawee by or on behalf of the holder or the drawer.

(2) A bill drawn upon two or more drawees may be presented to any one of them, unless the bill clearly indicates otherwise.

(3) Presentment for acceptance may be made to a person or authority other than the drawee if that person or authority is entitled under the applicable law to accept the bill.

Article 48

A bill is duly presented for acceptance if it is presented in accordance with the following rules:

(a) The holder must present the bill to the drawee on a business day at a reasonable hour. Where a place of acceptance is specified in the bill, presentment must be made at that place.

(b) If a bill is drawn payable on a fixed date, presentment for acceptance must be made before or on the date of maturity.

(c) A bill drawn payable on demand or at a fixed period after sight must be presented for acceptance within one year of its date.

(d) A bill in which the drawer has stated a date or time-limit for presentment for acceptance must be presented on the stated date or within the stated time-limit.

Article 49

Presentment for acceptance is dispensed with

(a) If the drawee is dead or has no longer the power freely to deal with his assets by reason of his insolvency, or is a fictitious person or a person not having capacity to incur liability on the instrument as an acceptor, or if the drawee is a corporation, partnership, association or other legal entity which has ceased to exist;

(b) When, with the exercise of reasonable diligence, presentment cannot be effected within the time-limits prescribed for presentment for acceptance.

Article 50

If a bill which must be presented for acceptance is not so presented, the drawer, the endorsers and their guarantors are not liable on the bill.

Article 51

(1) A bill is considered to be dishonoured by non-acceptance

(a) When the drawee, upon due presentment, expressly refuses to accept the bill or acceptance cannot be obtained with reasonable diligence or when the holder cannot obtain the acceptance to which he is entitled under this Convention;

(b) If presentment for acceptance is dispensed with pursuant to article 49, unless the bill is in fact accepted.

(2) If a bill is dishonoured by non-acceptance the holder may,

subject to the provisions of article 57, exercise an immediate right of recourse against the drawer, the endorsers and their guarantors.

[SECTION 2. PRESENTMENT FOR PAYMENT]

Article 52

(deleted)

Article 53

An instrument is duly presented for payment if it is presented in accordance with the following rules:

(a) The holder must present the instrument to the drawee or to the acceptor or to the maker on a business day at a reasonable hour;

(b) A bill drawn upon or accepted by two or more drawees, or a note signed by two or more makers, may be presented to any one of them, unless the bill or note clearly indicates otherwise;

(c) If the drawee or the acceptor or the maker is dead, presentment must be made to the persons who under the applicable law are his heirs or the persons entitled to administer his estate.

(d) Presentment for payment may be made to a person or authority other than the drawee, the acceptor or the maker if that person or authority is entitled under the applicable law to pay the instrument;

(e) An instrument which is not payable on demand must be presented for payment on the date of maturity or on one of the two business days which follow;

(f) An instrument which is payable on demand must be presented for payment within one year of its date;

(g) An instrument must be presented for payment:

(i) At the place of payment specified on the instrument; or

(ii) If no place of payment is specified, at the address of the drawee or the acceptor or the maker indicated on the instrument; or

(iii) If no place of payment is specified and the address of the drawee or the acceptor or the maker is not indicated, at the principal place of business or habitual residence of the drawee or the acceptor or the maker.

C. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document Symbol</i>
1. WORKING GROUP ON INTERNATIONAL NEGOTIABLE INSTRUMENTS, FIFTH SESSION	
Draft Uniform Law on International Bills of Exchange and International Promissory Notes (first revision)	A/CN.9/WG.IV/WP.6 and Add. 1 and 2
Provisional agenda	A/CN.9/WG.IV/WP.7
2. WORKING GROUP ON INTERNATIONAL NEGOTIABLE INSTRUMENTS, SIXTH SESSION	
Provisional agenda	A/CN.9/WG.IV/WP.8
Draft Convention on International Bills of Exchange and International Promissory Notes (first revision), articles 5, 6, 24 to 45, as reviewed by a drafting party	A/CN.9/WG.IV/WP.9

III. MULTINATIONAL ENTERPRISES

Note by the Secretary-General (A/CN.9/148)*

1. At its eighth session, the United Nations Commission on International Trade Law (UNCITRAL), having considered what steps would be appropriate in respect of the subject-matter of multinational enterprises, took note of the establishment by the Economic and Social Council of the Commission on Transnational Corporations. UNCITRAL decided to inform the Chairman of the Commission on Transnational Corporations that it had not taken a definitive decision concerning its programme of work in the field, but would continue to keep the subject under review, pending the identification by the Commission on Transnational Corporations of specific legal issues that would be susceptible to action by UNCITRAL, and that it would favourably consider any request which the Commission on Transnational Corporations might wish to address to UNCITRAL.¹

2. In accordance with this decision the Chairman of UNCITRAL addressed a letter, dated 16 April 1975, to the Chairman of the Commission on Transnational Corporations. The text of this letter is reproduced in annex I to this report.

3. By a letter dated 9 May 1977, Mr. Abdelmadjid Fasla, Chairman of the Commission on Transnational Corporations, replied to the above letter of the Chairman of UNCITRAL. The text of this letter is reproduced in annex II to this note.

ANNEX I

Letter dated 16 April 1975 from the Chairman of the United Nations Commission on International Trade Law addressed to the Chairman of the Commission on Transnational Corporations

I have the honour to refer to resolution 2928 (XXVII) adopted by the General Assembly at its twenty-seventh session on 28 November 1972 and at the request of the United Nations Commission on International Trade Law (UNCITRAL), to invite your attention, and through you, Mr. Chairman, the attention of the Commission on Transnational Corporations, to the following.

The General Assembly in paragraph 5 of the resolution to which I referred invited UNCITRAL "to seek from Governments and interested international organizations information relating to legal problems presented by the different kinds of multinational enterprises, and the implications thereof for the unification and harmonization of international trade law, and to consider, in the light of this information and the results of the available studies, including those by the International Labour Organisation, the United Nations Conference on Trade and Development and the Economic and Social Council, what further steps would be appropriate in this regard".

Pursuant to this mandate, UNCITRAL has had a questionnaire addressed to Governments and interested international organizations concerning legal problems presented by multinational enterprises, and the implications thereof for the unification and harmonization of international trade law. On the basis of a report of the Secretary-General (A/CN.9/104),* which analysed, *inter alia*, the replies to this

questionnaire, UNCITRAL, at its eighth session, held in Geneva from 1 to 17 April 1975, considered proposals for work which it might undertake pursuant to its mandate in this field. In this connexion it received with interest information concerning the proposed programme of work of your Commission and of the Information and Research Centre on Transnational Corporations.

During its session UNCITRAL considered the following courses of action. First, in view of the complex nature of the subject, involving not only legal issues but also issues of an economic, social and political character which may have a bearing on the formulation of legal rules, UNCITRAL would wish to follow closely the work of the Commission on Transnational Corporations and the studies of the Information and Research Centre on Transnational Corporations, with particular attention to the identification by your Commission and by the Information and Research Centre of issues that would be susceptible of action by UNCITRAL.

Secondly, UNCITRAL considered, among the suggestions made in respect to a programme of work in the field of multinational enterprises, the views expressed by many representatives that work could usefully be carried out by UNCITRAL on the following matters which seemed relevant directly or indirectly, in the context of international trade:

(a) The development of an information system. In this connexion several replies to the questionnaire addressed to Governments and interested international organizations had mentioned the need for standardized accounting procedures and statistical systems for specific data reporting. Some replies had suggested that an international convention should be formulated on the exchange of information, on disclosure, and on consultation and conciliation.

(b) The development of model rules, which States could embody in their national legislation with a view to exercising a greater degree of control over the activities of multinational enterprises. In this connexion, the possibility of requesting the Secretariat to prepare a comparative study of legislative rules in company laws, investment laws etc., that are designed to elicit information about such activities was considered.

UNCITRAL has not taken a definitive decision concerning its programme of work in this field but will continue to keep the subject under review. It is the desire of the members of UNCITRAL that I bring to your attention this matter and to inform the Commission on Transnational Corporations that UNCITRAL will favourably consider any request in respect of work concerning legal aspects of questions relating to multinational enterprises which the Commission on Transnational Corporations may wish to address to it.

ANNEX II

Letter dated 9 May 1977 from the Chairman of the Commission on Transnational Corporations addressed to the Chairman of the United Nations Commission on International Trade Law

I have the honour to refer to the letter dated 16 April 1975 from the Chairman of the United Nations Commission on International Trade Law to the Chairman of the Commission on Transnational Corporations, reproduced in document E/CN.10/7 of 6 May 1975, in which UNCITRAL informed us that it would favourably consider any request from our Commission in respect of work concerning legal aspects of questions relating to multinational enterprises.

* 23 February 1978.

¹ UNCITRAL, report on the eighth session (A/10017), para. 94 (Yearbook . . . 1975, part one, II, A).

* Yearbook . . . 1975, part two, VI.

At its third session the Commission on Transnational Corporations had before it resolution 31/99 in which the General Assembly "invites the Commission on Transnational Corporations, if it identifies specific legal issues in its programme of work that would be susceptible of action by UNCITRAL, to refer such issues to that Commission for its consideration".

The Commission on Transnational Corporations at its third session took note of that resolution and requested me, as its Chairman, to express its appreciation to your Commission for its offer of co-operation and to advise it that the Commission on Transnational Corporations would take advantage of that offer at the appropriate time.

IV. PROGRAMME OF WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

A. Report of the Secretary-General (A/CN.9/149* and Corr. 1 and 2)

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INTRODUCTION

1. The Commission, at its ninth session (1976), noted that it had completed, or would soon complete, work on many of the priority items included in its programme of work and that it was therefore desirable to review, in the near future, its long-term work programme. In the Commission's view, the establishment of a long-term programme of work would enable its secretariat to begin the necessary preparatory work in respect of items which it might wish to take up. The Commission instructed its secretariat to submit a report at its eleventh session (1978) after appropriate consultations with international organizations and trade institutions as to its contents.

2. The General Assembly, at its thirty-first session, welcomed the decision of the Commission to review its long-term programme of work and requested the Secretary-General to invite Governments to submit their views and suggestions on such a programme. (General Assembly resolution 31/99 of 15 December 1976.)

3. This report is submitted in compliance with the decision taken by the Commission at its ninth session (1976). The report seeks to do the following:

(a) To give an account of the programme of work, as originally agreed upon by the Commission at its first session and as subsequently expanded (chap. I);

(b) To give an account of the subject-matters falling

within the priority topics that have been completed (chap. II);

(c) To give an account of the subject-matters falling within the priority topics that have not yet been completed (chap. III);

(d) To give an analytical compilation of the proposals made by Governments and international organizations in respect of a new work programme (chap. IV); and

(e) Finally, to raise issues of working methods (chap. V).

In order to facilitate the discussion of items to be retained in the work programme of the Commission, there is set out, immediately after this introduction, a list of those subject-matters that were included in the first programme of work but have not yet been taken up and those that have been suggested by Governments and international organizations for inclusion in the future work programme.

4. The secretariat gratefully acknowledges the opportunity given to it by the Council for Mutual Economic Co-operation (CMEA) which kindly made arrangements for consultations between its member States and the Commission's secretariat. These consultations took place at the headquarters of CMEA in Moscow on 16 and 17 January 1978. The secretariat also gratefully acknowledges the opportunity to exchange views on the Commission's work programme with the member States of the Asian-African Legal Consultative Committee (AALCC), through the intermediary of Standing Sub-Committee on International Trade Law Matters of AALCC. These consultations took place at Doha from 19 to 23 January 1978. The resolution of the AALCC containing its proposals on the Commission's

* 4 May 1978.

** Notes by the Secretariat on subjects which may be included in the programme of work are reproduced in annexes I to III.

work programme is set forth in document A/CN.9/155.*

5. Steps have been taken to consult on the Commission's programme of work also with other international bodies representing other regions of the world. The secretariat expects to have such consultations with the member States of the Organization of American States and with the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe. An account of these consultations, if held before the eleventh session of the Commission, will be set forth in an annex to this report.

6. With respect to co-ordination of work, the Secretary of the Commission attended a meeting, held in Rome, on 27 and 28 February 1978, of a consultative group composed of the representatives of the secretariats of the Commission, UNIDROIT and the Hague Conference on Private International Law. A memorandum on this meeting is set forth in document A/CN.9/154.

LIST OF SUBJECT-MATTERS FOR POSSIBLE INCLUSION IN THE FUTURE WORK PROGRAMME¹

I. *Issues relating to international trade law*

1. Preparation of a code of international trade law (FP, NP; paras. 3 and 4)
2. Preparation of uniform conflict of law rules (NP; paras. 5 and 6)
3. Preparation of international contracts
Work directed to the unification of:
 - (i) Contracts of warehousing (NP; para. 7 (a));
 - (ii) Contracts of barter (NP; para. 7 (b));
 - (iii) Contracts for the supply of labour, or contracts where the party who orders the goods supplies a substantial part of the materials (NP; para. 7 (c));
 - (iv) General conditions on the erection and technical servicing of machines and industrial plant (NP; para. 7 (d));
 - (v) Contracts of leasing (NP; para. 7 (e));
 - (vi) Standard contract terms (FP, NP; para. 8);
 - (vii) Consequences of frustration (FP);
 - (viii) *Force majeure* clauses (FP, NP; para. 10);
 - (ix) Penalty clauses (NP; para. 11);
 - (x) Certain contractual issues of general application (e.g. set-off, suretyship assignment, transfer of property rights, formation of contracts in general, representation and full powers, frustration, damages, application of usages) (NP; paras. 12 and 13);
 - (xi) Contracts for quality control (NP; para. 14);

* Reproduced in this volume, part two, IV, B.

¹ In the list that follows, the letters "FP" indicate that the topic was formerly proposed for inclusion in the programme of work of the Commission, either at its first session or at a subsequent time. The letters "NP" indicate that the topic is a new proposal made for the purposes of deciding on a new programme of work. It will be noted that in several instances, former proposals have been repeated. The list does not include priority topics in respect of which work is not yet completed. These are set forth in chap. III of this report. The paragraph number noted after a topic indicates the relevant paragraph in the analysis of proposals of Governments and international organizations (chap. IV of this report) where the proposal relating to that topic is considered.

- (xii) Public tenders (NP; para. 15).
4. International payments
Preparation of uniform rules relating to:
 - (a) Electronic funds transfers (NP; para. 17);
 - (b) "Standby" letters of credit (NP; para. 18);
 - (c) Clauses protecting parties against fluctuations in the value of currency (NP; para. 19);
 - (d) Collection of commercial paper (NP, para. 20).
5. International commercial arbitration
 - (a) Study of means to make the UNCITRAL Arbitration Rules more effective (NP; para. 22 (a));
 - (b) Formulation of provisions for situations which cannot be dealt with by bilateral agreements (NP; para. 22 (b));
 - (c) Proposal relating to article V (1) (e) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NP; para. 23).
6. Transport² and transport insurance
 - (a) Drafting a convention on multimodal transport (NP; para. 24);
 - (b) Consideration of the law of charter parties (NP; para. 25);
 - (c) Consideration of legal issues relating to transport by container (NP; para. 26);
 - (d) Consideration of the law of transport insurance (NP; para. 27);
 - (e) Preparation of uniform rules relating to contracts for the forwarding of goods (NP; para. 28).
7. Agency
Legal issues arising out of agency contracts concluded for commercial purposes (FP, NP; para. 29).
8. Insurance (FP, NP; para. 30).
9. Products liability (FP, NP; para. 31).
10. Company law
The establishment and operation of commercial companies (NP; para. 32).
11. Intellectual property (FP)³
12. Legalization of documents (FP)⁴

II. *Issues arising from a possible reordering of international economic relations*

1. Legal implications of the new international economic order (NP; paras. 33 and 34).
2. Multinational enterprises (FP, NP; para. 35).

² It was proposed at the first session of the Commission that "transportation" be placed on the work programme of the Commission.

³ The Convention establishing the World Intellectual Property Organization (WIPO), Stockholm, 1967, states that the objectives of that organization are, *inter alia*, to promote the protection of intellectual property throughout the world through co-operation among States, and, where appropriate, in collaboration with any other international organization. WIPO became a specialized agency of the United Nations in December 1974.

⁴ The Convention abolishing the requirement of legalization for foreign public documents, The Hague, 5 October 1961, has been concluded under the auspices of the Hague Conference on Private International Law.

3. Transfer of technology (NP; para. 36).
4. Elimination of discrimination in laws affecting international trade (FP, NP; para. 37).

CHAPTER I. THE FIRST PROGRAMME OF WORK OF THE COMMISSION

A. General list of topics

1. At its first session, held at New York from 29 January to 26 February 1968, the Commission, following informal consultations between its members, unanimously accepted a working paper (A/CN.9/L.1/Rev.1) which read as follows:

I. List of topics

During the general debate the following topics were suggested by several delegations. A great number of delegations considered that all these topics should form the future work programme of the Commission. This list of topics is not exhaustive.

- (1) International sale of goods:
 - (a) In general;
 - (b) Promotion of wider acceptance of existing formulations for unification and harmonization of international trade law in this field including the promotion of uniform trade terms, general conditions of sale and standard contracts;
 - (c) Different legal aspects of contracts of sale like:
 - (i) Limitations;
 - (ii) Representation and full powers;
 - (iii) Consequences of frustration;
 - (iv) *Force majeure* clauses in contracts.
- (2) Commercial arbitration:
 - (a) In general;
 - (b) Promotion of wider acceptance of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
- (3) Transportation.
- (4) Insurance.
- (5) International payments:
 - (a) Negotiable instruments and banker's commercial credit;
 - (b) Guarantees and securities.
- (6) Intellectual property.
- (7) Elimination of discrimination in laws affecting international trade.
- (8) Agency.
- (9) Legalization of documents.

II. Priorities

The Commission decided that priority should be given to the following topics:

- (i) International sale of goods;
- (ii) International payments;
- (iii) Commercial arbitration.

III. Methods of work

Methods of work should be suitable to the particular topic under consideration.

- IV. Working groups, or sub-committees or other appropriate bodies of the Commission, should be appointed during the present session to deal respectively with the topics mentioned in paragraph II and submit their reports to the Commission at its next session.

- V. The Commission endorses the statement of the Chairman that it should take its decisions as far as possible by a consensus, failing which by a vote, as under the rules of procedure for the subsidiary organs of the General Assembly.

B. Priority topics

2. In the course of the same session, the Commission established a working group to advise it on the methods of work that should be followed in dealing with the three topics that had been given priority. The Working Group submitted a paper entitled "Methods of work for priority topics" (A/CN.9/L.3). After discussion, the Commission took a number of decisions on the methods of work for priority topics. These decisions are recorded in document A/CN.9/9, and may be summarized by reproducing the following passages:

International sale of goods

During the general debate the following items, falling within the scope of international sale of goods, were suggested by delegations:

- (a) International sale of goods in general;
- (b) Hague Conventions of 1964 relating to a Uniform Law on the International Sale of Goods and to a Uniform Law on the Formation of Contracts for the International Sale of Goods;
- (c) Hague Convention of 1955 on the Law Applicable to International Sale of Goods;
- (d) Elaboration of a commercial code;
- (e) Contracts of sale;
- (f) Different legal aspects of contracts of sale:
 - (i) Time-limits and limitations (prescription) in the field of international sale of goods;
 - (ii) Agency;*;
 - (iii) Consequences of frustration;
 - (iv) *Force majeure* clauses in contracts;
- (g) General conditions of sale, standard contracts, Incoterms and other trade terms."

Selected items

In view of the wide scope and complex nature of the concept of international sale of goods as laid down above, at this early stage the Commission found it impractical to deal with all the facets of the subject at the same time. Accordingly, the Commission selected some of the main items within the topic, i.e.:

- (a) The Hague Conventions of 1964;
- (b) The Hague Convention on Applicable Law of 1955;
- (c) Time-limits and limitations (prescription) in the field of international sale of goods;
- (d) General conditions of sale, standard contracts, Incoterms and other trade terms.

International payments

During the general debate the following topics, falling within the scope of international payments, were suggested by delegations:

- (a) Negotiable instruments;
- (b) Bankers' commercial credits;
- (c) Guarantees and securities.

Rather than making a comprehensive study of international payments as a whole, the Commission found it convenient . . . to deal separately with (i) negotiable instruments; (ii) bankers' commercial credits and (iii) guarantees and securities. Consistent with the object of the Commission, i.e. the progressive harmonization and unification of the law of international trade, it was agreed that the consideration of these items by the Commission should relate primarily to international transactions.

* Under this item it is intended to deal both with the common law concept of "agency" and the concepts of "représentation" (in French) and "full powers" in other systems.

International commercial arbitration

The Commission decided . . . to request the Secretary-General, in consultation with the organs and organizations concerned, to prepare a preliminary study of steps that might be taken with a view to promoting the harmonization and unification of law in this field, having particularly in mind the desirability of avoiding divergencies among the different instruments on this subject.

International legislation on shipping

3. At its second session (1969), the Commission decided to include international legislation on shipping among the priority items in its programme of work and established a working group, requesting it to indicate the topics and method of work on this subject. The Working Group submitted a report to the Commission at its fourth session (1971), recommending a programme of work in this area (A/CN.9/55).^{*} After considering the Working Group's report, the Commission decided to examine "the rules and practices concerning bills of lading, including those rules contained in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Brussels Convention 1924) and in the Protocol to amend that Convention (the Brussels Protocol 1968). . . with a view to revising and amplifying the rules as appropriate. . .".

CHAPTER II. WORK COMPLETED BY THE COMMISSION

(a) *International sale of goods*(i) *Draft Convention on the International Sale of Goods*

1. The text of this draft Convention was approved by the Commission at its tenth session (1977).

(ii) *Draft Convention on the Formation and Validity of Contracts for the International Sale of Goods*

2. It is expected that the Commission will approve the text of this Draft Convention at its eleventh session, and will then also have considered the question whether the provisions on the formation and validity of contracts should be the subject-matter of a separate convention.

3. The General Assembly, by resolution 32/145 of 16 December 1977, expressed the view that both draft Conventions should be considered by a conference of plenipotentiaries at an appropriate time, to be decided at its thirty-third session (1978) in the light of the recommendations to be submitted by the Commission.

(iii) *Prescription (Limitation) in the International Sale of Goods*

4. A Convention on the subject was adopted by a Conference of Plenipotentiaries held at New York from 20 May to 14 June 1974.

(b) *International payments**Bankers' commercial credits*

5. The Commission, at its eighth session (1975),

commended the use of the 1974 revision by the International Chamber of Commerce of "Uniform Customs and Practice for Documentary Credits" in transactions involving the establishment of a documentary credit.

(c) *International commercial arbitration*

6. The Commission, at its ninth session (1976), adopted the UNCITRAL Arbitration Rules. The General Assembly, by resolution 31/98 of 15 December 1976, recommended the use of the UNCITRAL Arbitration Rules in the settlement of disputes arising in the context of international commercial relations, particularly by reference to such arbitration rules in commercial contracts.

(d) *International legislation on shipping*

7. The United Nations Convention on the Carriage of Goods by Sea (the "Hamburg Rules") was adopted by a Conference of Plenipotentiaries held at Hamburg from 6 to 31 March 1978.

CHAPTER III. PRIORITY TOPICS IN RESPECT OF WHICH WORK IS NOT YET COMPLETED

1. Among the so-called "priority topics" referred to in chapter I of this report, the following matters have not yet been completed:

(a) *International sale of goods*

- (i) *1955 Hague Convention on the Law Applicable to the International Sale of Goods*⁵
- (ii) *General conditions of sale and standard contracts*

2. The Commission, at its tenth session (1977), decided to postpone work on "general" general conditions and to review the matter at its eleventh session in the context of its new programme of work.

(b) *International payments*

- (i) *Draft Convention on International Bills of Exchange and International Promissory Notes*

3. It is expected that the Working Group on International Negotiable Instruments will need one or two more sessions to complete its work. Consequently, a draft Convention together with a commentary and the observations of Governments and interested international organizations will probably be placed before the Commission at its thirteenth session (1980).

- (ii) *Uniform Rules applicable to international cheques*

4. The Commission, at its fifth session (1972), requested the Working Group "to consider the desirability of preparing uniform rules applicable to international cheques and the question of whether this can best be achieved by extending the application of the draft [convention on international bills of exchange and international promissory notes] to international cheques or by drawing up a separate uniform law on interna-

⁵ It is noted that the consideration of this Convention, for the purpose of establishing a more widely acceptable text, is within the original mandate of the Working Group on the International Sale of Goods set up by the Commission at its second session (1969).

^{*} Yearbook . . . 1971, part two, III.

tional cheques, and to report its conclusions to the Commission at a future session."

5. The Working Group requested the Secretariat, in consultation with the UNICITRAL Study Group on International Payments, to make inquiries regarding the use of cheques in international payments and the problems presented, under current commercial and banking practices, by divergencies between the rules of the principal legal systems. The Working Group is expected to take up the question of cheques upon termination of its work on bills of exchange and promissory notes.

(iii) *Security interests in goods*

6. The Commission, at its tenth session (1977), requested the Secretariat to submit, at its twelfth session (1979), a further report on the feasibility of uniform rules on security interests and on their possible content and, in particular, to ascertain the practical need and relevance of an international security interest for international trade.

(c) *International commercial arbitration*

7. In accordance with a decision taken by the Commission at its tenth session (1977), the Secretariat is preparing studies regarding the recommendations by the Asian-African Legal Consultative Committee⁶ and is conducting consultations in this regard. A report on this matter will be submitted to the Commission at its twelfth session (1979).

CHAPTER IV. ANALYSIS OF PROPOSALS BY GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS ON THE FUTURE WORK PROGRAMME OF THE COMMISSION⁷

1. *Issues relating to international trade law*

A. *Completion of existing work programme*

1. The Byelorussian SSR, Czechoslovakia, German Democratic Republic and Union of Soviet Socialist Republics propose the completion of work on the items included in the programme of work drawn up at the first session of the Commission.

2. The Asian-African Legal Consultative Committee (AALCC), Hungary and the United States propose continuance of the work on security interests. AALCC and the United States note the importance of security interests in international trade.⁸

⁶ These recommendations are set forth in a note by the Secretary-General (A/CN.9/127) (Yearbook... 1977, part two, III).

⁷ The proposals of Governments were sent in response to a request for such proposals made in a note verbale of the Secretary-General dated 1 February 1977. The Secretariat held consultations at Moscow with the Council for Mutual Economic Assistance on the future work programme on 16 and 17 January 1978, and the proposals made by States members of CMEA at those consultations were transmitted by the CMEA secretariat by letter dated 25 January 1978. In the analysis set forth below, the proposal of a State which was so transmitted is identified by placing the abbreviation "CMEA" in parentheses after the name of the State. It may be noted that some of the States participating in those consultations have sent independent replies to the note verbale dated 1 February 1977.

⁸ At its tenth session (1977) the Commission requested the Secretary-General to submit to the Commission at its twelfth session a report on the feasibility of uniform rules on security interests and on their possible content, taking into account the comments and sugges-

B. *Preparation of a code of international trade law*

3. Czechoslovakia, Bulgaria (CMEA), Hungary (CMEA) and Poland (CMEA) propose the preparation of a code of international trade law.

4. Czechoslovakia, while recognizing that the preparation of such a code would be a long-term project, notes that the commencement of preparatory work is desirable for the following reasons. The present system of unifying special areas of international trade law can eventually produce a lack of harmony between the various instruments of unification, both because the instruments might contain potential conflicts, and because the same problems may be resolved differently in different instruments. Further, areas will remain where divergent national laws would apply.

C. *Preparation of uniform conflict of law rules*

5. Bulgaria (CMEA), the Byelorussian Soviet Socialist Republic, Czechoslovakia, the German Democratic Republic, Hungary (CMEA), Poland (CMEA) and the Union of Soviet Socialist Republics propose the preparation of uniform rules to resolve conflict of law issues arising out of an international trade transaction.

6. Czechoslovakia notes that, until a uniform code of international trade law is widely adopted, conflicts of potentially applicable national laws will arise in relation to international trade transactions, and that therefore the unification of the relevant conflict of law rules would enhance legal security in international trade.

D. *Uniform rules relating to international contracts*

(i) *Uniform rules for certain types of contracts*

7. It is proposed that the formulation of uniform rules be undertaken on the following:

(a) The contract of warehousing⁹ (German Democratic Republic, Germany, Federal Republic of,¹⁰ (CMEA) and Hungary (CMEA));

(b) Contracts of barter¹¹ (AALCC, Czechoslovakia and USSR (CMEA)). It is noted that such contracts are becoming increasingly important in transactions between developing and developed countries (AALCC), and that they are not regulated by the draft Convention on the International Sale of Goods (Czechoslovakia);

(c) Contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services, and contracts for the supply of goods

tions made in the Commission, and to carry out further work on the subject in consultation with interested organizations and banking and trade institutions, and in particular to ascertain the practical need and relevance of an international security interest for international trade UNICITRAL, report on the tenth session (A/32/17), para. 37; Yearbook... 1977, part one, II, A).

⁹ UNIDROIT is currently examining the feasibility of formulating draft uniform provisions on the liability of persons other than the carrier having custody of the goods before, during or after the transport operation. A "Preliminary report on the Warehousing Contract" (ref.: Study XLIV—Doc. 2, 1976) was issued, and circulated for comments by Governments and interested organizations. In May 1977, a study group was established on this subject.

¹⁰ The proposal of the German Democratic Republic (CMEA) was that the responsibility for goods before and after transport be considered, and this would involve consideration of the liability of warehousemen.

¹¹ See annex II to this report, containing a note by the Secretariat on the international contract of barter.

to be manufactured or produced where the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production (AALCC and Czechoslovakia). It is noted that such contracts are important (AALCC), but excluded from the scope of the draft Convention on the International Sale of Goods (Czechoslovakia);

(d) General conditions on the erection and technical servicing of machines and industrial plant (Byelorussian SSR and USSR);

(e) The contract of leasing in international trade (Hungary).

(ii) *Standardization of contractual terms or clauses*

8. The United States and AALCC note the value of standard contract provisions, or trade terms, accepted on a wide basis, in the solution of contractual problems in international trade. It is noted that such provisions can resolve problems not capable of solution by legal principles of general application (United States) and that they can also foster the establishment of legal norms acceptable to both developing and developed countries (AALCC).

"General" general conditions

9. Czechoslovakia and Hungary (CMEA) note that the feasibility of drafting "general" general conditions for use in international trade should be considered.¹²

"Force majeure" clauses

10. Bulgaria (CMEA), the Byelorussian SSR, Hungary (CMEA), Poland (CMEA) and the USSR propose the formulation of standard clauses regulating the effect of the failure to fulfil his obligations by a party to an international trade contract due to an impediment beyond his control ("force majeure" clause).

Penal clauses

11. Poland proposes the formulation of standard clauses regulating the imposition of fines and penalties in international trade contracts.¹³

(iii) *Unification of the rules on certain contractual issues arising in relation to all types of contracts*

12. Czechoslovakia notes the desirability of drafting uniform rules on certain contractual issues of general application, such as set-off, suretyship, assignment, transfer of property rights, formation of contracts in general, representation and full powers, frustration, damages and application of usages. It notes that such unification would be a preparatory step towards the eventual formulation of an international trade code.

13. The Byelorussian SSR and the USSR propose the unification of rules on the transfer of property rights.

(iv) *Unification of rules for certain needs ancillary to the formation or performance of contract*

Contracts for quality control

14. Czechoslovakia notes the need for uniform rules for contracts regulating the relations between an agency which checks the quality of goods, and the party who employs such an agency, because of the importance of such contracts, and the current lack of uniform rules on that subject.

Public tenders

15. Czechoslovakia also proposes the formulation of uniform rules regulating public tenders, as such tenders are important in connexion with the formation of contract, and the draft Convention on the Formation of Contracts for the International Sale of Goods does not deal with such tenders.

E. International payments

16. The following proposals are made in relation to this subject.

Electronic funds transfers

17. The United States proposes the study of legal issues arising from the transmission of funds and the making of payments by electronic means. It notes that, while there is increasing use of electronic fund transfers, there has been insufficient development of rules to resolve the legal problems thereby created.¹⁴

"Standby" letters of credit

18. Australia proposes the formulation of uniform rules regulating the issue of "standby" letters of credit, used to secure the performance of a borrower's obligations under an international loan which is independent of any sales transaction. Under such "standby" letters of credit, the banker reimburses the lender in the event of the borrower's default. In support of this proposal, Australia notes:

(a) The increasing use of such letters of credit in international trade; and

(b) That, in the absence of uniform rules as to the conditions under which payment has to be made under such letters, there is a possibility of abuse by dishonest beneficiaries.

Clauses protecting parties against fluctuations in the value of currency

19. Hungary (CMEA) and Poland (CMEA) propose the formulation of clauses which would protect a party to whom monetary obligations are owed against fluctuations in the value of currency.

¹² At its tenth session (1977), the Commission decided "to postpone work on 'general' general conditions and to review the matter when it considers, at its eleventh session, the proposals of the Secretary-General for its long-term programme of work" (A/32/17, para. 36). It may be noted that the Asian-African Legal Consultative Committee has prepared a standard form of FOB and FAS Contract for use in sales of certain types of commodities, and is currently preparing a standard form of CIF (maritime) Contract for sales of light machinery and durable consumer goods.

¹³ See annex I to this report, containing a note by the Secretariat on liquidated damages and penalty clauses.

¹⁴ See annex III to this report, containing a note by the Secretariat on electronic funds transfer.

Collection of commercial paper

20. Czechoslovakia proposes the consideration of uniform rules for the collection of commercial paper.¹⁵

Bank guarantees

21. Czechoslovakia proposes the consideration of problems arising out of bank guarantees.¹⁶

F. International commercial arbitration

22. The United States and AALCC propose further study on measures to promote international commercial arbitration. It is proposed that attention should be given:

(a) To means whereby the UNCITRAL Arbitration Rules can be made more effective (United States);

(b) To formulating provisions which, while maintaining the principle that arbitration as a means of dispute settlement depended on the will of the parties, would remedy situations which cannot be dealt with by bilateral agreement (United States);

(c) To the specific proposals already submitted by AALCC to the Commission (AALCC).¹⁷

23. ICC proposes that, if the Commission were to examine the possibility of revising the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, it should consider the effect of article V(1)(e) of that Convention. Under that provision, recognition and enforcement of an award may be refused if it has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. The ICC notes that, as a result, even if an award is set aside or suspended by a competent authority because of a particular local rule, the award could not be enforced in countries in which it would otherwise be valid, and that this creates difficulties in arbitration practice.

*G. Transport**Multimodal transport*

24. The United States notes that, after the Commission's work in preparing a draft Convention on the Carriage of Goods by Sea, it appears to be the appropriate body to prepare a draft Convention on multimodal transport.¹⁸

Charter-parties

25. Czechoslovakia (CMEA), the Byelorussian SSR and the USSR propose the consideration of the law relating to charter-parties.¹⁹

¹⁵ The International Chamber of Commerce has published "Uniform Rules for the Collection of Commercial Paper" (1967).

¹⁶ The International Chamber of Commerce is currently drafting uniform rules on contract guarantees.

¹⁷ For these specific proposals, see document A/CN.9/127 (Yearbook... 1977, part two, III).

¹⁸ In pursuance of resolution 1734 (LIV) of the Economic and Social Council, the Trade and Development Board, by its decision 96 (XII) of 10 May 1973, established an Intergovernmental Preparatory Group to elaborate a preliminary draft of a convention on international intermodal transport. The work of this Group is not yet completed.

¹⁹ The UNCTAD Working Group on International Shipping Legis-

Transport by container

26. Hungary proposes that work be undertaken on legal issues relating to transport by container.²⁰

Transport insurance

27. The Byelorussian SSR, Czechoslovakia (CMEA) and the USSR propose the consideration of the law of transport insurance.²¹

Contracts for the forwarding of goods

28. The Byelorussian SSR, Czechoslovakia and the USSR propose that work be undertaken in relation to contracts for the forwarding of goods in international transport.²²

H. Agency

29. Bulgaria (CMEA), the German Democratic Republic, Hungary, Poland (CMEA) and the USSR propose the examination of legal issues arising out of contracts of agency concluded for commercial purposes, including brokerage contracts and contracts for commercial representation.²³

I. Insurance

30. Hungary proposes the examination of legal problems in insurance.

K. Products liability

31. Mexico proposes that further work be under-

lution, at its first session (1969), adopted the subject of charter-parties as part of its programme of work. At its fourth session (1975), the Working Group considered a study by the UNCTAD secretariat on this subject, and requested the secretariat to make additional studies. It is expected that that Working Group will again consider this subject in 1979 in the light of the additional studies.

²⁰ In response to decision 6 (LVI) of the Economic and Social Council, the Trade and Development Board has, by its decision 118 (XIV) of 13 September 1974, established an *Ad Hoc* Intergovernmental Group on Container Standards for International Multimodal Transport. The work of this Group is not yet completed.

²¹ The UNCTAD Working Group on International Shipping Legislation, at its first session (1969), adopted the subject of marine insurance as part of its programme of work. The UNCTAD secretariat is currently preparing a study on legal and commercial problems in this field, and it is expected that the Working Group will consider this study in 1978.

²² UNIDROIT prepared in 1966 a draft Convention on the contract of international forwarding agency of goods.

²³ (a) A Committee of Governmental Experts, established under the auspices of UNIDROIT, completed in 1972 a draft convention providing a uniform law on agency of an international character in the sale and purchase of goods. This draft Convention will be submitted to a diplomatic Conference in 1979.

(b) The Commission of the European Communities has commenced work toward harmonization of the laws of States members of the European Economic Community (EEC) concerning the practice of the profession of "commercial agent". A draft directive on the subject was prepared and submitted by the Commission to the Council of Ministers of the EEC in December 1976.

(c) The Hague Conference on Private International Law has adopted a Convention on the Law Applicable to Agency. This convention determined the law applicable to relationships of an international character arising where the agent has the authority to act, acts or purports to act on behalf of a principal in dealing with a third party. The Convention covers (a) the relationship between principal and agent, and (b) the relationship of both principal and agent with third parties arising from the agent's activities.

taken on liability for damage caused by defective products.²⁴

L. Company law

32. Bulgaria (CMEA) and Madagascar propose that work be undertaken on the establishment and operation of commercial companies.²⁵

2. Issues arising from a possible re-ordering of international economic relations

A. Legal implications of the new international economic order

33. The Asian-African Legal Consultative Committee (AALCC) proposes that the Commission should draw up its programme of work with due regard to the policies underlying the new international economic order.²⁶ It notes that, in respect of items included by the Commission in the programme of work established at its first session, the Commission had carried out its work within the context of existing legal frameworks and that, for this reason, its work did not in every instance fully reflect the interests of the world community as a whole nor the relevant resolutions of the sixth and seventh special sessions of the General Assembly concerning the new international economic order. It further suggests the establishment of a working group to study the implications for international trade law of the new international economic order.

34. Czechoslovakia, Hungary and Yugoslavia also propose that work should be undertaken on issues arising from the re-ordering of international economic relations, including legal issues relating to the new International Economic Order. They note that such work would lead to the resolution of international economic problems, and a strengthening of trade relations between States.

Multinational enterprises

35. Czechoslovakia, the German Democratic Republic, Hungary and Poland (CMEA) propose the consideration of legal problems arising from the activities of multinational enterprises. The German Democratic

Republic notes that these activities have an adverse effect on the economies of developing countries.²⁷

Transfer of technology

36. Czechoslovakia proposes that work be undertaken on the transfer of technology.²⁸

B. Elimination of discrimination in laws affecting international trade

37. Czechoslovakia, Hungary, Poland (CMEA) and the USSR propose the consideration of legal issues arising from the principle of non-discrimination in international trade. Bulgaria (CMEA), Hungary (CMEA), Poland (CMEA) and the USSR (CMEA) specifically note that attention should be given to the application in international trade of the principles underlying the most-favoured-nation clause.²⁹

CHAPTER V. ISSUES RELATING TO THE ESTABLISHMENT OF A NEW PROGRAMME OF WORK

The mandate of the Commission

1. The mandate of the Commission is defined in section I of General Assembly resolution 2205 (XXI) of 17 December 1966 as "the progressive harmonization and unification of the law of international trade, in accordance with the provisions set forth in section II³⁰ below". When the current work programme was established at the first session of the Commission, attention was directed to a definition of the law of international trade as "the body of rules governing commercial relationships of a private law nature involving different countries". However, there was general agreement that the formulation of a definition was not essential at that stage of the work of the Commission.³¹ While the work so far completed by the Commission has exclusively related to commercial relationships of a private law nature, some proposals for the future work programme (such as work on legal issues related to the new international economic order) will involve subjects of a public economic law nature. In its comments on the future work programme, Yugoslavia has noted the utility of considering the mandate of the Commission in

²⁴ At its tenth session (1977) the Commission decided not to pursue work on this subject, and that the matter be reviewed in the context of its future programme of work at a future session if one or more member States of the Commission should take an initiative to that effect. (A/32/17, para. 44).

²⁵ The Commission of the European Communities is working on the harmonization of the company law of the member States of EEC. This projected harmonization covers such issues as the merger of companies (sociétés anonymes), the structure of such companies and their accounts, and the contents and dissemination of prospectuses containing stock offerings. In addition, an *ad hoc* working group of the Council of Ministers of EEC will examine the draft Statute for European Companies (le statut des sociétés anonymes européennes) which is aimed at the creation of a community-wide law on companies (droit communautaire des sociétés anonymes).

²⁶ On the new international economic order, see General Assembly resolutions 3201 (S-VI) of 1 May 1974, entitled "Declaration on the Establishment of a New International Economic Order", and 3202 (S-VI) of 1 May 1974, entitled "Programme of Action on the Establishment of a New International Economic Order"; resolution 3281 (XXIX) of 12 December 1974, entitled "Charter of Economic Rights and Duties of States", and resolution 3362 (S-VII) of 16 September 1975 entitled "Development and International Economic Co-operation". The resolution of AALCC embodying its proposal relating to the new international economic order is contained in document A/CN.9/155 (Yearbook . . . 1971, part two, III).

²⁷ For the previous decision of the Commission on this subject and an exchange of letters pursuant to that decision with the Commission on Transnational Corporations, see document A/CN.9/148. It may also be noted that para. 4 (g) of General Assembly resolution 3201 (S-VI) noted above and section V of General Assembly resolution 3202 (S-VI) noted above, relate to the regulation and control of the activities of transnational corporations.

²⁸ This subject is under consideration by an UNCTAD Intergovernmental Group of Experts on an International Code of Conduct on Transfer of Technology. It may also be noted that paragraph 4 (b) of General Assembly resolution 3201 (S-VI) noted above, and section IV of General Assembly resolution 3202 (S-VI) noted above, relate to the transfer of technology.

²⁹ The subject of the most-favoured-nation clause is under consideration by the International Law Commission, which at its twenty-eighth session (1976) adopted draft articles on this subject. The draft articles have been circulated to Governments for their comments, and it is expected that the International Law Commission will, at its thirtieth session (1978) consider the draft articles in the light of the comments submitted, and complete its work.

³⁰ Section II of the resolution sets forth the organization and functions of the United Nations Commission on International Trade Law.

³¹ UNCITRAL, report on the first session, (A/7216), paras. 23 and 24 (Yearbook . . . 1968-1970, part two, I, A).

view of the possible inclusion in the work programme of subjects of this nature.

Co-ordination of work of other organizations

2. General Assembly resolution 2205 (XXI) states that the Commission shall further the progressive harmonization and unification of the law of international trade by, *inter alia*,

- (i) Co-ordinating the work of organizations active in this field and encouraging co-operation among them;
- (ii) Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;
- (iii) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade.³²

3. The object of these provisions appears to be to make the Commission the body responsible for organizing and directing all work connected with the unification of international trade law. However, up to the present stage of the Commission's work this object has not been fully realized. While the work of some organizations is to some extent carried on in collaboration with the Commission, other organizations both within the United Nations family and outside it sometimes work in areas of international trade law without any reference to the Commission. Several factors may have contributed to this. In some instances, the programme of work of other organizations was established at about the same time the Commission was established, and accordingly there was no proper opportunity for co-ordination. Again, certain organizations do not appear readily to accept the pre-eminence of the Commission in the field of international trade law. Furthermore, the Commission has been mainly concerned with working on its priority subjects, and has directed less attention to co-ordination. It would, however, be appropriate at this stage to examine the question of co-ordination, not only because it has been stressed by some Governments,³³ but because a lack of assertion by the Commission of its proper role could have unfortunate consequences: duplication of work, and a gradual erosion of the area of competence of the Commission. The Commission may therefore wish to consider the methods by which a better co-ordination of work can be achieved.

Methods of work

4. In carrying forward its work, the Commission has adopted a variety of working methods, i.e. established working groups or study groups, entrusted work to a Special Rapporteur, authorized the engaging of consultants, and requested studies to be made by the Secretariat. These working methods have proved ade-

quate in relation to the current programme of work where the method of work most appropriate to the subject in question has been selected. The Commission may wish to consider whether any modifications to these working methods are desirable, with particular reference to the future programme of work.

Possible scope of the future work programme

(i) Period of projection of the future work programme

5. In its comments on the future work programme, the United States notes that it is undesirable to include in the future work programme projects that would take many years to complete, since the current rapid growth and change in international trade might result in the projects when completed being of little utility. Certain proposals, however, such as the drafting of a Trade Code, involve work extending over many years. The Commission may wish to consider this issue.

(ii) Establishment of working groups

6. Owing to financial restrictions, the Commission is not free to establish more than three working groups at any one time. At present, the working group on negotiable instruments has yet to complete its work. It is expected that this work in so far as it relates to the preparation of a draft convention on international bills of exchange and international promissory notes, will be completed in 1979.

ANNEX I*

Note by the Secretariat: liquidated damages and penalty clauses

1. The United Nations Commission on International Trade Law at its tenth session requested the Secretary-General

"to consider, as part of the study on the future long-term programme of work of the Commission which is to be presented at the eleventh session of the Commission, the feasibility and desirability of establishing a uniform régime governing liquidated damage clauses in international contracts".^a

This report is written in response to that request.

2. The request by the Commission arose out of a proposal submitted during the course of the tenth session that the draft Convention on the International Sale of Goods include a provision on liquidated damages and penalty clauses^b in contracts for the international sale of goods. During the ensuing discussion, it became apparent that there was considerable support for the idea behind the proposal, i.e. that uniform rules regulating liquidated damages and penalty clauses would be an important contribution to the facilitation of international

* Originally issued as A/CN.9/149/Add.1 on 1 May 1978.

^a UNCITRAL; report on the tenth session A/32/17, annex I, para. 513 (Yearbook . . . 1977, part one, II, A).

^b A significant difficulty in terminology exists which goes to the substance of the subject-matter of this report. In the French, Russian and Spanish languages the technical name for the type of clauses under discussion is "penalty clause". Common law countries distinguish "penalty clauses" from "liquidated damages clauses" for purposes of determining the validity of such clauses. Other legal systems which recognize the validity of clauses which serve as a means of encouraging performance of the contract as well as of those intended as an estimate of damages nevertheless use different terms to describe such clauses and differentiate between them in regard to their legal consequences. Since the choice of terminology in a given legal system sometimes leads to expectations as to the consequences arising out of the use of such a clause, it was thought best, at this stage of the Commission's consideration, to use terminology which minimized these expectations.

³² Para. 8, subparas. (a), (f) and (g) of the resolution.

³³ Czechoslovakia and the German Democratic Republic, in their comments on the future work programme, note the need for closer co-ordination. Czechoslovakia stresses the need for close co-ordination with other United Nations bodies, in particular with UNCTAD and the International Law Commission, and notes the possibility of collaborating with UNCTAD in its work on charter-parties and marine insurance. It also notes the desirability of co-ordination with UNIDROIT and the Hague Conference on Private International Law. The importance of co-ordination was also stressed during the deliberations leading to the establishment of the first work programme of the Commission (A/7216, paras. 25-28).

trade and commerce. However, it was generally considered that establishing a unified régime was a complex problem which warranted more attention than could be given at that stage of the deliberations in respect of the draft Convention. Furthermore, liquidated damages and penalty clauses were also important in many types of contracts which were outside the scope of the draft Convention. For all these reasons, it was suggested that it would be preferable to deal with liquidated damages and penalty clauses in a separate instrument which could be applied to a wider range of international contracts and not be restricted to contracts for the international sale of goods.^c

Desirability of unification

3. Clauses or stipulations providing for the payment of damages or of a penalty on default are in wide use in commercial contracts. Their purpose is to determine in advance the amount of damages in the event of a breach of contract or, by imposing a penalty for such breach, to encourage performance of the obligations under the contract. Frequently such clauses or stipulations are intended to serve both purposes.

4. Such clauses are attractive to merchants and their lawyers. If the sum stipulated in the clause is high enough, it increases the likelihood that the other party will perform his obligations at the time and in the manner agreed. If the other party does not perform in conformity with the contract, the clause gives an easy, rapid and clear calculation of the compensation for that breach. This is true whether the clause was intended to make an accurate estimate of the actual damages, to encourage performance by stipulating by way of penalty a sum higher than the estimated damages, or to limit damages by stipulating a sum less than the estimated damages. As a result, the likelihood of controversy between the two parties is reduced, along with the costs directly involved in settling any dispute and the danger of rupturing the business relationship between the parties.

5. These advantages of the clauses would seem to be even more significant in a contract between parties from two different countries. The possibilities for delay or failure of performance are greater, the informal pressures which can be exerted to encourage performance by the other party are less effective, and access to a foreign legal system—which would be necessary for at least one of the parties in case of litigation—is more difficult and expensive than when the contract is between two parties from the same country.

6. Nevertheless, various restrictions are placed by different legal systems on the use of such clauses. In some jurisdictions, a court will not enforce a clause in a contract unless it is construed as providing for liquidated damages rather than as providing for a penalty. In some other jurisdictions, a court may revise a clause which sets the compensation either substantially higher or substantially lower than the estimated damages. This result may reflect the view that the dominant purpose of such clauses is a pre-estimate of future damages in cases of breach or may reflect the view that the clause might have been imposed by the economically stronger party. As a result most legal systems appear to authorize the courts either to disregard such a clause or to lower the amount stipulated in it if the amount stipulated appears to be excessively high, and, in some legal systems, to raise the amount stipulated in the clause if that amount appears to be excessively low.

7. Even within legal systems which have the same underlying philosophy towards the use of these clauses there are often important differences in the law in respect of such questions as to whether damages may be awarded in addition to the stipulated sum, whether the sum may be stipulated in terms other than money, and whether a party who is not liable for damages for failure to perform his obligations because that failure was due to an impediment beyond his control is also by that impediment absolved from liability to pay the sum stipulated.

8. Since some legal systems restrict the freedom of the parties to contract in respect of liquidated damages and penalty clauses, the merchant community cannot overcome the diversity of legal régime by agreement amongst themselves. It is therefore submitted that, if unification is to be achieved, it must be by international legislation.

Feasibility of unification

9. Although there are important differences in public policy which lie behind the rules in respect of liquidated damages and penalty clauses in the various countries, it would appear that these differences can either be minimized or avoided. This is particularly true in respect of the rules which have developed in some countries to protect consumers from the abusive use of such clauses. The elimination of all consumer transactions from the eventual unified régime should reduce the difficulties of introducing rules which may be different from those which have been developed in the national legal systems to govern consumer as well as non-consumer contracts.

10. In addition, less opposition is to be expected to a change in the law where the clause is stipulated in a contract between parties from different States. In such a case, and in the absence of uniform legislation, rules of private international law come into operation to determine whether and to what extent a liquidated damages or penalty clause will be enforced by the foreign court that is seized of the suit. It is thus possible that, in a case before a foreign court, a party will have a penalty clause enforced against him though under the domestic law of that party's State such a clause would have been held invalid or would have been modified by reducing the damages stipulated. Conversely, a party may not be able to obtain enforcement of such a clause even though in the court of his own State adjudication would have led to a recognition of the rights stipulated in that clause.

11. It is not possible within the scope of this report to analyse the kinds of contract for which a unified régime in respect of liquidated damages and penalty clauses might be adopted. Nevertheless, in view of the fact that the common law systems and the civil law systems are in agreement that such clauses can serve a useful function but that they can be utilized to take unfair advantage of the other party, it seems reasonable to conclude that agreement could be reached on rules in respect of liquidated damages and penalty clauses for use in a wide range of contracts used in international trade.

ANNEX II*

Note by the Secretariat: international barter or exchange

1. In the course of consultations with international organizations on the future programme of work of the Commission, attention was drawn to the growing importance of transactions by barter or exchange. Such transactions can be distinguished from sale transactions in that the goods sold are not to be paid for by money, but by other goods or some other valuable consideration.

2. Legal systems approach the contract of barter or exchange in different ways. In general, civil law systems provide expressly that the provisions on sale apply, by analogy, also to barter,^a and specify that each of the parties to a contract of barter is considered the seller of the goods which he transfers and the buyer of the goods which he receives. A similar approach is found in the Uniform Commercial Code of the United States of America which, in section 2-304, provides that "the price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer."

3. The approach of common law countries that follow the English Sale of Goods Act, 1893 is different. Section 1 of that Act restricts the meaning of a contract of sale to a contract "whereby the seller transfers or agrees to transfer the property of goods for money consideration". Where the consideration for the transfer of goods is not money, there is a contract of exchange that is distinguished from a contract of sale, and the Sale of Goods Act has no direct application to such a contract.^b Apparently, the common law principles applicable to sales of goods are ordinarily applicable to exchanges.^c

* Originally issued as A/CN.9/149/Add.2 on 12 May 1978.

^a E.g. Brazil, *Código Civil*, art. 1164; Ethiopia, *Civil Code*, art. 2409; France, *Code civil*, art. 1707; Germany, *Federal Republic of*, *BGB*, art. 515; Hungary, *Civil Code*, art. 386; Italy, *Codice Civile*, art. 1552-1555; Netherlands, *Civil Code*, art. 1582; Russian Soviet Federated Socialist Republic, *Civil Code*, art. 255; Switzerland, *Code des obligations*, art. 237. See also *International Trade Code of Czechoslovakia*, art. 425.

^b Benjamin, *Sale of Goods*, 1st ed. (1974), p. 29; Cheshire and

^c A/32/17, annex I, paras. 510-512.

4. That the law relating to barter or exchange transactions is relatively undeveloped may be due to the fact that, on the domestic level, such transactions are apparently not very frequent. Where they do so occur, the provisions on sale will be made applicable by analogy in some countries or, in other countries, the common law principles applicable to sales will apply. However, there is evidence that international barter or exchange transactions are now quite frequent and that their economic function and importance may be considerable. Thus, so-called "compensation" transactions, amounting to an exchange of goods, are often resorted to in order to ease foreign exchange difficulties.

5. It is submitted that the international barter or exchange transaction is of sufficient commercial importance to warrant further study. Such a study would probably show that a unified régime in respect of international barter transactions could not be satisfactorily established by merely widening the scope of application of the draft Convention on the International Sale of Goods so as to include such transactions. First, the provisions of that draft Convention do not, in every instance, meet the issues that are inherent in a barter transaction, and difficult problems of interpretation would arise because of the fact that goods or another consideration, not being money, are substituted for the purchase price in money. Second, the régime of remedies for non-performance would have to be adapted, in particular in connexion with the remedy which consists in a reduction of the price. Third, the sales provisions do not contain provisions relating to the supply of technical services and documentation in respect of the goods sold; under many international exchange contracts part of the consideration consists in the supply of such services and documentation.

6. It is suggested that the Commission retain provisionally the contract of international barter or exchange in its programme of work, pending a study by the Secretariat on the scope and contents of a possible uniform régime. Such a study could be submitted to the Commission at its twelfth session in 1979.

ANNEX III*

Note by the Secretariat: some legal aspects of international electronic funds transfer

INTRODUCTION

Background

1. At the Commission's fifth session (1972), in connexion with the consideration of the item "International payments", attention was drawn to the significant changes in international banking practices brought about by recent developments in electronic payment methods and procedures and the hope was expressed that the Commission's work in the field of international payments would take account of such developments.^a At its third session, in connexion with its assessment of the desirability of preparing uniform rules applicable to international cheques, the Commission's Working Group on International Negotiable Instruments requested the Secretariat "to obtain information regarding the impact, in the near future, of the increased use of telegraphic transfers and of the development of telecommunication systems between banks on the use of cheques for settling international payments".^b

2. The present note, prepared in the context of the Commission's impending consideration of its future programme of work, seeks to

outline those legal issues in international electronic funds transfer with respect to which the Secretariat's inquiries among banking and commercial circles have revealed a need or a desire for action on the international level. It may be noted in this connexion that this subject was considered at some length at the last session of the UNCITRAL Study Group on International Negotiable Instruments (19-22 September 1977), a summary of which deliberations is included in this note (see paras. 36-48 below).^c

The existing system

3. Electronic funds transfer (EFT) is a general term by which is comprehended all those developments in the field of payments which have as their objective, or effect, the total or partial elimination of the ordinary paper-transmitted order and the substitution therefor of machine-processible electronic impulses.

4. A numerous variety of electronic funds transfer systems (EFTS) have been developed or may be contemplated, many of which are currently in use in various countries, though largely for domestic rather than international transfers. These range from a simple system in which paper-born data is encoded by the first bank on to a magnetic tape for automatic processing by itself and subsequent banks to which the tape is delivered to such fully automatic and computerized system as the so-called point-of-sale transfer system; in the latter, the system's computer link-ups enable an authorized user, by inserting a plastic card into a terminal located at a payee-merchant's premises and punching the requisite entry in the keys, to cause funds to be transferred from his account at a bank to the merchant's account at the same or other participating bank almost instantaneously (i.e. in "real time", as it is referred to).

5. In the context of international payments, however, the two most common "electronic" means of transfer at present are still transfer by cable or by telex. These two modes of transfer may be illustrated by the following simple example. A buyer, B, wishing to transmit funds to a seller, S, in another country approaches bank X where he maintains an account and requests it to transmit for his account a specified amount to S. Bank X, having debited B's account for the amount in question or being otherwise put in funds, sends an order by cable or by telex to bank Y, its correspondent bank in the place where payment is to be made, requesting it to pay S the specified amount and debit bank X's account. Bank Y carries out the order by paying the amount personally to S, by forwarding a bank cheque to him or by depositing the amount in his bank account in bank Z, where this is known.

6. It may be observed with respect to these modes of transfer that they are at best only quasi-electronic, particularly as regards the cable transfer, in that the end-product contemplated is a piece of paper in which the payment order to bank Y is embodied and which is not directly susceptible of electronic processing by bank Y.

Future trend

7. The future trend is towards further reduction, if not eventual elimination, of the mediating role of paper in such transactions. This would not only speed up the process considerably but would lower costs by facilitating retrieval of information and by eliminating tedious manual checking of documents as well as opportunities for clerical error. A fully electronic transfer system would, in the example given above, envisage a link between the computers of banks X and Y and possibly Z either directly or, where such operates, indirectly, via a message-switching network embracing a large number of other banks. The payment order could then be executed almost instantaneously by means of credit and debit actions by the computers involved in response to electronic messages originating from the X bank computer.

8. A further requisite of a fully automatic and integrated EFTS is an arrangement for clearing of the transactions between originating and receiving banks such as is exemplified by the "automatic clearing houses" (ACH) which operate in the United States of America. These are regional associations of banks and other financial institutions each of which maintains facilities through which are channelled

^a Fifoot, *Law of Contract*, third Australian edition, by J. G. Starke and P. F. P. Higgins, p. 211.

^b Halsbury, *Laws of England*, vol. 29, 3rd ed. (1960), p. 387.

^c Originally issued as A/CN.9/149/Add.3 on 1 May 1978.

^a UNCITRAL, report on the fifth session (A/8717), para. 57 (Yearbook . . . 1972, part one, II, A).

^b Report of the Working Group on International Negotiable Instruments on the work of its third session (1975), (A/CN.9/99), para. 136 (Yearbook . . . 1975, part two, II, I).

^c Attention may also be drawn to the fact that at least one State (United States of America) has formally proposed the inclusion of the item on electronic funds transfer in the Commission's future programme of work. See chap. IV, para. 17, of the present report.

all electronic funds transfer communication between and among its members. Each such message is received, recorded and forwarded electronically by the ACH, which on the basis of such records effects settlement, according to the association rules, between the members' accounts either immediately or, more commonly, at the close of each business day or on the day following.

9. The automatic clearing function may, of course, also be performed by a bank, such as a central bank, at which all other banks maintain deposits. This is the case, for example, with the Federal Reserve System in the United States which for long has performed automatic clearing functions for banks on a regional basis and most recently has decided to link up these regional clearing facilities into a national network.⁴ A similar automatic clearing function is performed in France by Banque de France. It does seem doubtful, however, that direct automatic clearing facilities between private banks could be easily established on the international level in view of the enormous political and economic policy questions that must first be resolved. Such a system is, however, feasible among central banks and others so permitted by the law of their own domiciliary States such as the banks members of the Bank for International Settlements.

10. Although no fully integrated and automatic funds transfer system exists so far at the international level, a noteworthy development along these lines is SWIFT—Society for World-Wide Interbank Financial Telecommunications. SWIFT, which is based in Brussels, is an association of several hundred banks including a number of central banks, in Europe and North America. Its principal function is to maintain facilities for automatic message transmission between its subscriber-banks via an electronic network linking the members' computers and other data-processing devices. While SWIFT does not itself function as an automatic clearing-house, its effect is nevertheless to provide such rapid communication between and among all the banks involved that near-instantaneous crediting and debiting of accounts maintained at such banks becomes feasible, subject only to subsequent settlement between the banks in an agreed manner.

ANALYSIS

11. Two levels of issues arise in relation to electronic funds transfer in international payments: the first is of a general nature and the second relates to the legal relationship between specific parties to an EFT transaction.

Issues of a general nature

12. One concern that features prominently in any discussion of this subject is that of the security of EFTS from unauthorized, and particularly fraudulent, access. This concern is accentuated by the following generally recognized facts. Firstly, a computer-based system is extremely vulnerable to manipulation by anyone with the necessary expertise and access; many apprehended embezzlers, especially employees, have often indicated that they had been tempted to try by the seeming simplicity of the process and the large reward that could be reaped in a computer-aided fraud. Secondly, it seems very doubtful that a system could be devised that is completely fraud-proof, although the level of sophistication required of the thief could be made very high indeed. Thirdly, whereas computer fraud is relatively easy to commit, its detection can be very difficult and costly not only because there is no physical paper to examine for alterations, etc. but also because the computer can itself be commanded to "forget" (i.e. erase) any traces of the fraudulent transactions, leaving, as it said, no "audit trail".⁵

13. The problem of security is presumably made more difficult by the international linkages required to effectuate international funds transfer by electronic means. There are more points at which access can be gained to the system, the level of effective security available at

the various points may be quite uneven, especially if, as is often the case, lines have to be leased from public carriers in the various countries linked; and such breaches of the security of the system as do occur may become even harder to track down.

14. A second concern frequently expressed relates to the effect which the development of computerized electronic data processing, of which EFT is an aspect, may have on the enjoyment of the right to privacy. The computer's immense capacity for gathering, storing, retrieving and extrapolating from, data about any and all subjects poses the risk, it is said, that no fact about participants in an EFT scheme could remain private and secure. This goes not only for the bank's customers but also for the bank itself.⁶

15. Such concern has led in many jurisdictions to strict laws regulating not only the kinds of information which may be collected or retained, but also the conditions for their use or publication. A recent example is the Federal Republic of Germany's Federal Data Protection Act of 27 January 1977.⁷ The problem here for the international transaction, quite apart from the substantive one of the protection of privacy, is that individual jurisdictions may enact privacy laws which are divergent not only in the duties imposed on operators of an EFTS but also in the level of protection from dissemination accorded particular kinds of financial information. This would not only complicate the compliance situation of the banks involved but would make for uncertainty in a field which above all requires certainty, confidentiality and finality of transactions. Information which under the law of one jurisdiction was protection from disclosure might, by reason of a bank's involvement in EFT transactions with a bank in a different jurisdiction which did not accord similar protection to such information, become publicly available.

16. One other source of difficulty which would require co-operation on the international level relates to the legal status, particularly in litigation, of records generated by an EFTS. The large sums of money which may be at stake in such a litigation could make this issue a quite important one.

17. The problem arises because in place of the written paper record, the system substitutes in whole or in part electronic data stored only in machine-readable code form on magnetic or paper tapes, computer cards and memory devices. While this in general causes no problem under the civil law systems, which it appears, would have no difficulty admitting in evidence a properly-authenticated computer print-out, a different consequence may attach to this form of record under a common law or common-law derived legal system. First of all, business records are in general admissible only as an exception to the hearsay rule⁸ and then only under certain strict conditions, such as that of entries in question must have been made contemporaneously with the event recorded, by a person who has personal knowledge of the transaction and is unavailable as a witness. The question thus is whether a computer-kept record can meet these conditions. Where, for example, one computer (the receiving bank's computer) is triggered to make complicated calculations and entries, even generate conclusions, by another computer (e.g. the ACH computer) which itself is activated by entries made in the terminal of a third computer (the originating bank's computer) at some far-off location, is the resulting record made by a person? What about the elements of personal knowledge of the entry and of availability of the maker as a witness?

18. Similarly the common law best evidence rule requires produc-

⁴ The fear that this would give central banking authorities a new source of information with which to monitor the international banking community is cited as one reason for the decision not to make of SWIFT a full-blown clearing system. See article by W. Hall in the June 1973 issue of the London magazine *The Banker*.

⁵ Gesetz zum Schutz vor Missbrauch personenbezogener Daten bei der Datenverarbeitung (Bundesdatenschutzgesetz-BDSG) vom 27.1.1977 (BGBl. I S.201).

⁶ The hearsay rule holds inadmissible in court any testimony or written evidence of a statement made out of court offered to establish the truth of the matter asserted in the statement. See Richardson, *On Evidence*, §200 et seq. (10th ed., Prince) (New York, Brooklyn Law School). Since a computer print-out is in fact a written statement made out of court it is hearsay evidence and as such inadmissible, save as an exception, to establish the truth of what is therein contained.

⁴ See *The New York Times*, 17 April 1978, p. D1.

⁵ Thus, in one case which occurred in the United States, access was gained by a competitor to a company's highly valuable trade secret by "tapping" from outside of the company's premises, the line by which the company's central computer communicated with equipment at an outside location. This example also makes the point that companies often have a proprietary interest in the security of their electronic communication system extending beyond simple protection of their funds.

tion of the original entry in order to prove the contents of a writing.¹ Since in the case of a computer-kept record the original entry consists of patterns of electronic impulses captured on tape or in the computer's memory devices, none of which can be apprehended by human beings, except in the form of print-outs, the argument could be made that such print-outs are not "original" records and so are inadmissible as the best evidence of the matter therein contained. There is the point, furthermore, of the self-serving nature of a computer print-out generated specifically as evidence in the dispute at hand.

19. The difficulties which can arise in this context may be illustrated by the following example. Company A, domiciled in State X, a jurisdiction in which computer print-outs are admissible as evidence of the matter therein contained, is in dispute with Company B, domiciled in State Y, a jurisdiction which is strict about the inadmissibility of such evidence. Under the rules of private international law, matters of evidence and procedure are governed by the rules of the forum (*lex fori*). Suppose then that either State X or State Y would have jurisdiction to entertain an action on this matter. The consequence, assuming no other source of evidence, would be that a different result would be arrived at depending on whether the action was brought in State X or in State Y. Furthermore, Company B would be in a position of being able to assert against Company A in State X a claim of defence, based on the print-out, which Company A could not assert against Company B in State Y.

20. Although some attempt has been made in a number of common law jurisdictions to resolve certain of these issues either by statute or by pragmatic judicial interpretation of the rules of evidence,² it is doubtful whether the underlying problem can be resolved short of some form of international agreement on the issue.

Specific legal questions

21. A number of questions arise as to the legal relationship of parties to an EFT transaction. Before considering some of these issues in detail reference should be made to a conceptual question of some practical significance. This is the debate which is taking place in a number of countries as to the category of legal rules under which electronic funds transfer operations should be subsumed: the special rules governing the bank collection process or some other régime such as the general law of contracts or, as some have advocated, a specially-enacted EFT law? This debate has generally taken place against the background of demands for greater consumer protection in response to the fact that banks have so far conducted their EFT activities under private contractual arrangements between themselves and the other parties concerned, including their customers, who, it is said, may be too weak to secure equitable terms for themselves.

22. The importance of this debate for the international payment situation is that it can well be expected to lead to EFT legislation in individual countries which, if not harmonized, will tend to complicate the position of banks engaging in international electronic funds transfer, especially if such banks have operations in many countries. Even the mere fact that the domestic EFT transaction is subject to one régime of rules while the international transaction is subject to a different régime could require costly adaptation in many cases.

23. As far as the international transaction is concerned, it will in all likelihood continue for the time being to be regulated, at least as regards the relationship between the financial institutions involved, by private contract. This raises the question as to the adequacy of private contract to provide solutions to all the problems that may possibly arise in EFT operations. While recognizing the wisdom of leaving it to private parties to run their own private commercial affairs, especially where such parties are sophisticated financial institutions, one may nevertheless draw attention to certain limitations of private contract in this regard. Firstly, whilst a contractual arrangement may provide an excellent régime for resolving disputes between the parties thereto, it generally is of limited value in resolv-

ing questions as to rights and obligations of third parties. Thus, for example, in an EFT transaction involving a transferor, A, his bank, B₁, a clearing-house, C, the transferee, D, and the transferee's bank, B₂, contractual agreements between A and B₁, between B₁, C and B₂ and between D and B₂ would have very little to contribute on the question of whether C or B₂ may be liable to A, or whether C or B₁ may be liable to D. Secondly, even as between the parties involved, a contract may be silent as to a particular issue, e.g. as to who, as between B₁, C and B₂, bears the risk for an unexplained computer error causing loss.

24. These considerations would thus tend to favour the idea of a comprehensive, international legal framework for electronic funds transfer, even if this were only optional or supplementary to private contract.

25. Turning now to legal issues that may arise in a specific EFT situation when something goes wrong and the need arises to allocate responsibility and consequent loss among the parties involved, it should be observed that, quite apart from fraudulent and other unauthorized tampering with the system—matters already alluded to above—any number of things could go wrong in an EFT system. As a result, say, of computer malfunction, the payer's account might be debited with too much or too little; the account of the intended payee might be debited while that of the intended payee might be credited; the account of a third party involved in the transaction might get debited or credited; or the transfer order might go unexecuted altogether or be only partially executed. The possibilities might be illustrated by the following hypothetical examples.

Bank-customer relationship

Case I: responsibility for error, mistake, computer malfunction.

26. A, a businessman in country X, instructs his bank to transmit a substantial sum of money to B, a businessman in country Y. Part of the money was in payment for goods shipped by B and part A's contribution to a fund for joint exploitation of a highly lucrative business opportunity. Payer bank transmits transfer order by electronic medium through an ACH to B's bank. Because of slight malfunctioning of ACH computer order to B's bank to credit his account omits special security code, so it is discounted by the bank's computer as not being genuine though the order could have been easily verified. By the time the error is discovered, it is too late. The business opportunity on which A had been relying to rescue his business from financial difficulties has fallen through and A is in bankruptcy. B must take his place in line with other creditors.

27. *Quere:* (1) What, if any, is liability of A's bank:

(a) To A? Could A argue that the bank had chosen the means by which it was going to carry out the transfer and so should be accountable for any errors?

(b) To B? Could a payee in such circumstances have a claim against the originating bank or is the absence of a direct contractual relationship between the two fatal to such claim? (Cf. cases of transfer of funds by cable or telegraph where in some countries the payee has generally been unable to maintain a claim against the originating bank when something has gone wrong.)

(2) What, if any, is liability of ACH:

(a) To A? Is ACH assimilated to legal position of originating bank vis-à-vis A?

(b) To B? Is ACH's legal position similar to that of a telegraph company or other message carrier used to transmit long-distance transfer orders between banks?

(3) What, if any, is liability of B's bank:

(a) To A? Is legal status of receiving bank vis-à-vis A that of subagent?

(b) To B? Is legal relationship between B and his bank as regards the transaction in question of creditor-debtor?

Case II: time and finality of payment issues.

28. A and B both maintain accounts at the same branch of a foreign bank X. A, having received value from B, instructs X to transfer an agreed amount from A's account to B's account as of a

¹ See Richardson, *op. cit.* §297.

² See, for example, as to the United States, the Uniform Business Records as Evidence Act, 28 U.S.C. (United States Code) 1732 (a), the Uniform Photographic Copies of Business and Public Records Act, New York Civil Practice Law and Rules, rule 4539 and also *Transport Indemnity Co. v Seib*, 132 N.W. 2d 871 (Nebraska, 1965); and, as to the United Kingdom, the Civil Evidence Act, 1968, S.5.

specified date. X, upon receipt of A's instructions, sets in motion the computer process whereby A's account will be debited and B's credited with the stated amount. Under X's internal EFT procedures, a customer's final balance with respect to in-house transactions is determined as of the day following such transactions, leaving the possibility of reversing erroneous entries at that time without the customer's knowledge. Subsequent to the debit-credit instructions to its computer, but on the same day, X learns of A's insolvency and on the next day reverses the debit-credit entry in the accounts of A and B since on the basis of that transaction A's account is in a net debit situation.

29. *Quaere*: (1) What is the legal position of X vis-à-vis B? Could B claim repayment of the amount in question on the ground that payment was complete as soon as the payment instructions were accepted and the process commenced, or, at any rate, as soon as the credit entry was actually made? Could X, on the contrary, argue, by analogy to the cheque-collection situation, that any credit entry must remain provisional and conditional until it had actually "collected" the requisite funds from the payer, A; or alternatively, that the transfer was not complete until B had received notice of the credit in his favour?^k

(2) When in general is payment "final" or "complete" in an electronic payments situation? Since in a fully computerized system execution of the transfer order in terms of the appropriate debiting and crediting could be accomplished in a matter of minutes at most (the projected time for a typical SWIFT message from one end to the other is one minute), how are factors such as bankruptcy, death, incapacity, revocation of collecting bank's authority and stop-payment orders, etc. which might ordinarily interrupt the payment process, to be accommodated in an EFTS? What about bank errors, including computer and clerical errors? Should all EFT entries be considered provisional or should a general and independent power be recognized in the bank to reverse, and so undo, entries subsequently discovered to have been erroneous?

Case III: the problem of "float".

30. A instructs his bank, X, to transfer a very substantial sum of money to B's account in a foreign branch of the same bank to reach B by a certain date. A assumes that the transfer will be effected by cable and, wishing to be very cautious, allows more than the usual number of days between the date he issues his order and his account is debited and the date when he expects the payment to reach B. X, however, transmits the funds on the last day by which B must receive payment through an EFT network of which it has just become a subscriber.

31. *Quaere*: (1) Can A claim from X interest on the transmitted funds from the time his account was debited to the time when it actually was credited to B?

(2) Can B claim interest on the same funds for the same period on the ground that the transaction should have been transmitted electronically on the first day, or alternatively, from the time when the payment could have reached him if effected by cable promptly on receipt of the transfer order to the time when it actually was credited to his account?

(3) Who in general is entitled to the benefit of the "float" in an EFT operation?

Interbank relationship

32. As with the bank-customer relationship, many questions can

^k It will be recognized that these were the basic facts and issues in the English case of *Momm and Others v. Barclays Bank International Ltd.* [1976] 3 All E.R. 588. In that case the court held that payment was complete once X decided to accept A's transfer order and set in motion the computer process for effecting such transfer and B could, therefore, reclaim the sum in question from X. It is widely recognized that the decision in this case could quite conceivably have gone the other way and might still if the same issues came up in a different jurisdiction. The significance of the case in this context is that it points up how ill-defined, unclear and uncertain the rules regarding EFT still are and the potential for divergent developments under individual national laws in the absence of an internationally-sanctioned uniform legal framework. It also underlines the essential insufficiency of the régime of private contract to regulate electronic funds transfer operations in all their aspects.

arise with respect to the legal relationship between banks involved in an EFT operation. These questions tend in the main to relate to the allocation of responsibility, and hence the distribution of the consequent loss, when something has gone wrong in the transfer operation. Thus, for example, suppose that in the hypothetical case put above (case I, para. 26 above) the fault lay in the failure of the receiving bank to credit its customer's account with items properly communicated to it and the originating bank incurs liability as a result? A question would arise as to what remedy, if any, the originating bank had against the receiving bank? Similarly, the receiving bank could incur liability as a result of acting on instructions emanating from the originating bank's malfunctioning computer or as a result of fraudulent tampering with the computer programme by employees of the originating bank who, it is claimed, were negligently given access to the originating bank's terminals. In addition cases may arise in which there is admitted error but it is not clear as to where in the system the malfunction occurred, how it occurred, or who is to blame for it.^l

33. All these matters would in a typical EFTS be regulated by private agreement between the banks concerned, or where there is an intermediary association, such as a clearing-house, by the rules of the association and by the established customs and practices of banks in their relations among themselves. The sole question then is whether these consensual rules and the established practices provide an adequate and satisfactory regulatory régime for a phenomenon of such far-reaching implications as electronic funds transfer bearing in mind especially the limitations to self-regulation some of which were discussed above (para. 23).

34. One might also recall in this connexion the various other aspects of the subject of automatic data processing in international trade evidenced by such developments as the current study by the International Chamber of Commerce of the possibility of replacing negotiable documents of title (bills of lading, warehouse receipts, etc.) by electronic data communication, the related project under study by the Economic Commission for Europe and the commonly-held view that negotiable instruments in general—bills of exchange, promissory notes, cheques, etc.—should one day be replaced in their international payment function by EFT. All of this would seem to speak to the necessity for a comprehensive, uniform and integrated legal framework for electronic data processing (including EFT) in international trade.

35. Many of the other interbank and interinstitutional issues as, for example, the kinds of institutions which may engage in EFT business, the question of fair access to any EFT facilities for smaller institutions, the existence or otherwise of any anticompetitive aspects to EFT operations are essentially domestic law matters and will not be discussed in this paper. It may, however, be observed that if, as it now seems realistic to suppose, one EFT organization were to emerge as the sole or primary medium for international electronic funds transfer, interest would surely grow and pressure mount for bringing what was effectively a monopoly of a vital aspect of international trade under a regulatory régime other than private contract.^m Such pressure would undoubtedly increase if the EFT system in question were at any point to add any clearing function to its services.

SUMMARY OF DELIBERATIONS OF THE UNCITRAL STUDY GROUP

36. At a recent session of the UNCITRAL Study Group on International Payments (19 to 22 September 1977) the issues outlined in paragraphs 37 to 48 below were identified as requiring study with respect to the role of EFT in international payments.

37. *Time of payment. When is payment final?* The Group was of the view that this was an issue of paramount importance in international electronic funds transfer.

38. The Group reached the preliminary conclusion that there appeared to be a case for a uniform international rule on this question.

39. *Allocation of liability for errors, mistake and fraud.* It was

^l Freak atmospheric occurrences (e.g. lightning) have been said sometimes to cause changes such as erasures on computer magnetic tapes.

^m A recent report indicates that SWIFT, with a current membership of over 500 institutions on both sides of the Atlantic and plans to extend operations to Japan and South America in the near future, could well become such a medium.

noted that such questions were generally regulated by private agreement among the parties to an EFT operation. A question was raised in this connexion as to how much autonomy the law should allow the parties not only as regards their rights *inter se* but also as regards their legal position vis-à-vis third parties. It was suggested that, by analogy to the through-cargo rules proposed by UNCTAD under which the originating carrier remained responsible to the shipper for the safety of the cargo and proper performance of the carriage throughout the entire voyage, regardless of the use of intervening carriers, the originating bank in an EFT transaction should be likewise accountable to the customer-transferor for the proper and timely payment of the sum to the transferee irrespective of the role of any intervening banks.

40. It was also suggested that with respect at least to fraud a rule might be adopted for EFT similar to that followed for the paper-based transfer, namely, that liability should rest on the person who "enabled" the fraud to be committed.

41. The Study Group reached the preliminary conclusion that there was also a *prima facie* case for work in this area with a view to arriving at a common international position with respect to these issues. It was suggested that this could be done by way either of uniform rules or of general conditions regulating bank-customer relations in an EFT transaction.

42. *Privacy with respect to EFT data.* Two aspects of privacy were noted by the Study Group: the protection of a customer's EFT records from access by public authorities or third parties without due process of law, and the need to ensure that only data strictly relevant to the business purpose was gathered and/or stored by operators of EFT systems.

43. No common position emerged in the Study Group as to the proper international response on this issue. Some members would leave this matter to national law whereas others pointed to the ensuing difficulty should individual national laws diverge on the kinds of data which should be protected and the level of protection to be granted them where the data in question could physically be retrieved in any of the countries linked by an EFT network.

44. *Usefulness to the customer of computer-produced records.* Concern was expressed as to the effect which computerization and the consequent elimination of the traditional paper-based record might have on the availability to the customer of adequate and legally admissible records of his transactions. The customer might require such records both as proof of payment and for official (e.g. tax) and other purposes. Apart from the admissibility problem in common law jurisdictions, there was the fact that unlike in the paper-based system where the customer had in his hands a piece of paper evidencing his transactions with a bank, the evidence in an EFT situation was often in the memory of the computer of the same bank against whom the customer may have a dispute. The customer must then depend on his adversary to obtain the evidence he needs.

45. The Study Group again did not arrive at any consensus as to

the appropriate international response, if any, on this question and recommended that the question be not pursued at this stage.

46. *"Float" within the EFTS; who is entitled to benefit?* The Study Group noted that under current bank EFT practices, it was customary to draw a distinction between customer-to-customer and interbank transfers: crediting was effected as soon as possible in the latter situation whereas in the former there was generally a time-lag (sometimes of up to two days) between debiting the transferor and crediting the transferee during which the bank took advantage of the interest and "float" of the funds.

47. The Group noted, however, the difficulty of establishing uniform banking rules or practices on this matter. As the experience with regard to the rules on documentary credit had shown, banking practices varied so much from country to country; banking practice in one country might consider 24 hours a reasonable time-lag while in others a period of 10 days or even three weeks would be considered normal. Account had also to be taken of the varying stages of development with respect to electronic technology attained in different countries.

48. The Group did not arrive at any recommendation with respect to this issue.

CONCLUSIONS

49. While it is true that most of the existing and operational EFT schemes are still small in scope, seen from the point of view both of the number of participants and the amounts involved as well as of the services offered, and that the more ambitious schemes are still only projections, there appears to be universal agreement that electronic funds transfer could in due course become the principal payments mechanism in and between the most advanced economic systems. Certainly, as the SWIFT project indicates, a major role can be anticipated for EFT in the field of international commercial transactions, not only because of the speed and greater reliability which it would impart to such transactions, but also because of its promise of cost-savings through the standardization of message elements and media and the reduction or elimination of such costly factors as delay, clerical errors, loss or misplacement of items, etc., which seem to be unavoidable features of the paper-based system.

50. The regulatory régime of private contract under which present international EFT operations are carried on may be said to have worked well enough so far and furthermore may be acknowledged to possess features such as flexibility and adaptability which would be desirable in any régime. Even so, its inherent limitations, as, for example, in the matter of third-party rights, as well as the enormous implications for international trade of electronic data processing in all its aspects, would appear to enjoin the elaboration, not perhaps immediately, but at some appropriate point in the future, of an international legal framework to provide certainty and uniformity in this key area of international commercial transactions.

B. Note by the Secretary-General: recommendations of the Asian-African Legal Consultative Committee (A/CN.9/155)*

1. The Asian-African Legal Consultative Committee (AALCC),¹ at its nineteenth session held at Doha, Qatar, from 16 to 23 January 1978, considered the possible composition of the future programme of work of the Commission.

2. At the conclusion of its deliberations, AALCC adopted the resolution concerning the future programme of work of the Commission that is set forth as an annex to this note.

* 4 May 1978.

¹ The membership of AALCC consists of 35 States of the Asian-African region.

ANNEX

Decision by the Asian-African Legal Consultative Committee on the future programme of work of the Commission

(Taken at its nineteenth session, Doha, Qatar, 16-23 January 1978)

The Asian-African Legal Consultative Committee,

Having considered at its nineteenth session the request of the General Assembly of the United Nations that Governments submit their views and suggestions on the long-term programme of work of the United Nations Commission on International Trade Law (UNCITRAL) (resolution A/31/99);

Having noted the views expressed in this respect by its Subcommittee on International Trade Law Matters;

Being convinced that it is important that UNCITRAL, when drawing up its new programme of work, should give due considera-

tion to the relevant provisions of the resolutions of the sixth and seventh special sessions of the General Assembly of the United Nations that laid down the foundations of the new international economic order;

Recommends that UNCITRAL should include in its programme of work an item entitled "legal implications of the new international economic order on international trade law", and should, in order to deal with this matter expeditiously, establish a special committee or working group on the new international economic order and request it to place before it proposals as to the legal instruments that would be necessary to implement the policies underlying the new international economic order;

Further recommends that UNCITRAL should include in its programme of work the following subject-matters:

- (a) International commercial arbitration;
- (b) Barter-contracts;
- (c) Catalogue of trade terms;
- (d) Uniform rules or standard contract forms for the supply of goods to be manufactured or for the supply of labour or other services; and
- (e) Security interests;

Requests its Secretary-General to draw the attention of member States of AALCC, in particular those that are also member States of UNCITRAL, to the desirability of having their representatives or observers, as the case may be, participate in sessions of UNCITRAL and its subordinate bodies;

Decides to consider the action taken by UNCITRAL in response to this resolution at its next session.

C. Note by the Secretary-General: proposal by France (A/CN.9/156)*

A proposal by France for inclusion of an item in the programme of work of the Commission was received during the eleventh session. The proposal, though not identical, is from a technical point of view related to the proposal made by Hungary and Poland in respect of clauses protecting parties against fluctuations in the value of currency.** The proposal is reproduced in an annex to this note.

ANNEX

Proposals by France

At the recent United Nations Conference on the Carriage of Goods by Sea, the question of determining a unit of account which would enable the amounts fixed by the Convention on the Carriage of Goods by Sea to be expressed in national currencies was raised once again.

The abandonment of the reference to gold in transactions between monetary authorities in 1968 and the discontinuance of the convertibility of the dollar into gold in 1971 spelled the end of the system of reference to gold which had been used for decades in international conventions on carriage and liability, whether in the form of the so-called "germinal" franc (10/31 milligrammes of gold of millesimal

fineness nine hundred), used principally in conventions on carriage by rail, road and inland waterway, the "Poincaré" franc (65.5 milligrammes of gold of millesimal fineness nine hundred), used mainly in conventions on carriage by air or sea, or the "E.M.A." unit (0.88867088 milligrammes of fine gold) of the European Monetary Agreement and the Paris Convention on Civil Liability in the field of Nuclear Energy.

The most recent conventions have used the International Monetary Fund unit known as "special drawing rights" (SDR). This is only a temporary solution, however, for SDRs, which are made up essentially of a "basket" of currencies, do not guarantee a constant real value. Above all, they pose very serious problems for countries which are not members of IMF, for whom a different system must be established. This difficulty now arises each time a unit of value has to be expressed in an international convention, and none of the solutions proposed so far, however ingenious, has been completely acceptable to everyone.³

The French Government suggest that, as part of its long-term programme of work, UNCITRAL should study ways of establishing a system for determining a universal unit of constant value which would serve as a point of reference in international conventions for expressing amounts in monetary terms. UNCITRAL could, for instance, explore the possibility of creating a unit which would be determined and would evolve by reference to the value of a number of goods and services characteristic of international trade.

* 2 June 1978.

** See A/CN.9/149, chap. IV, para. 19 (reproduced in the present volume, part two, IV, A above).

³ On this point, see document A/CONF.89/C.1/L.109 of the United Nations Conference on the Carriage of Goods by Sea.

V. ACTIVITIES OF OTHER ORGANIZATIONS

Report of the Secretary-General: current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/151)*

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INTRODUCTION

1. The United Nations Commission on International Trade Law, at its third session, requested the Secretary-General "to submit reports to the annual session of the Commission on the current work of international organizations in matters included in the programme of work of the Commission".¹

2. In accordance with the above decision reports were submitted to the Commission at the fourth session

in 1971 (A/CN.9/59), at the fifth session in 1972 (A/CN.9/71), at the sixth session in 1973 (A/CN.9/82), at the seventh session in 1974 (A/CN.9/94 and Add. 1 and 2),** at the eighth session in 1975 (A/CN.9/106),*** at the ninth session in 1976 (A/CN.9/119)**** and at the tenth session in 1977 (A/CN.9/129 and Add. 1).†

* 9 May 1978.

** Yearbook...1974, part two, V.

*** Yearbook...1975, part two, V.

**** Yearbook...1976, part two, VI.

† Yearbook...1977, part two, VI.

¹ UNCITRAL, report on the third session (A/8017), para. 172 (Yearbook...1968-1970, part two, III, A).

3. The present report, prepared for the eleventh session (1978), is based on information submitted by international organizations concerning their current work. In some cases, this report includes information on progress with respect to projects for which background material is included in earlier reports.² The current activities of the following international organizations are described in the present report:

(a) *United Nations bodies and specialized agencies:* United Nations Conference on Trade and Development (UNCTAD) (paras. 21, 39-42, 58-59, 129-130, 132); United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) (paras. 6, 18, 51, 72, 126, 139); United Nations Economic Commission for Europe (ECE) (paras. 10, 17, 34, 43, 49-50, 61, 75, 81, 87, 123-125, 138); United Nations Economic Commission for Latin America (ECLA) (para. 52); United Nations Industrial Development Organization (UNIDO) (paras. 131-132); Food and Agriculture Organization of the United Nations (FAO) (paras. 11, 127); World Health Organization (WHO) (paras. 11, 127); International Civil Aviation Organization (ICAO) (paras. 53-54, 76); International Monetary Fund (IMF) (para. 29); Inter-Governmental Maritime Consultative Organization (IMCO) (paras. 37-38, 55); and World Intellectual Property Organization (WIPO) (paras. 83-86, 89-96, 99-100, 102-109, 115).

(b) *Other international organizations:* Asian-African Legal Consultative Committee (AALCC) (paras. 5, 15-16, 71, 135-136); Asian Development Bank (para. 35); Central Office for International Transport by Rail (OCTI) (paras. 48, 56); Commission of the European Communities (CEC) (paras. 23, 73, 101, 110, 112, 114); Council for Mutual Economic Assistance (CMEA) (paras. 9, 45-47, 97-98, 122, 133-134, 137); Council of Europe (paras. 22, 24, 74, 113, 117); Hague Conference on Private International Law (paras. 7, 30, 78-80, 88); International Bank for Economic Co-operation (para. 31); and International Institute for the Unification of Private Law (UNIDROIT) (paras. 8, 44, 55, 111, 116, 118-121).

(c) *International non-governmental organizations:* Inter-American Commercial Arbitration Commission (IACAC) (para. 69); International Chamber of Commerce (ICC) (paras. 12, 19, 25-28, 57, 62-68, 70, 77, 82); International Chamber of Shipping (ICS) (paras. 36, 60, 128); International Maritime Committee (CMI) (paras. 13, 20, 33, 38, 63); and International Organization for Standardization (ISO) (para. 14, 32).

4. This report is arranged according to major subjects in international trade law. Under each subject the relevant activities of the international organizations are discussed in turn.

I. INTERNATIONAL SALE OF GOODS

5. The International Trade Law Sub-Committee of AALCC considered in January 1978 the text of the draft Convention on the International Sale of Goods that had been prepared by UNCITRAL.

6. The International Trade Division of ESCAP is now engaged in identifying possible areas of co-

operation with both international and national organizations with a view to the harmonization and unification, on the regional level, of the law on the international sale of goods.

7. For the work of the Hague Conference on Private International Law (the Hague Conference) on a Protocol to the 1955 Convention on the Law Applicable to International Sale of Goods, see paragraph 78 below (VII. Private international law; B. *International Sale of Goods*).

II. INTERNATIONAL CONTRACTS

A. Formation of international contracts

8. In April 1977 the Steering Committee of UNIDROIT adopted the text of the revised draft Uniform Law on the Formation of Contracts in General. The Steering Committee is also considering a draft Uniform Law on the Interpretation of Contracts which, together with a questionnaire, has been sent for comments to a large number of individuals and organizations engaged in the study of international trade law. Based on the replies to this questionnaire, the Steering Committee is preparing the final text of the draft Uniform Law on the Interpretation of Contracts in General.

B. General conditions for international contracts

9. The General Conditions of Delivery of Goods, currently in force among trading organizations in the member States of CMEA, were approved in 1968 and modified in 1975. Work within CMEA is continuing, aimed at improving further the provisions of the General Conditions of Delivery and of other common terms within the CMEA system.

C. International trade terms and standards

10. Under the auspices of the Economic Commission for Europe (ECE), the Working Party on Facilitation of International Trade Procedures has identified a list of about 130 documents used in international trade (TRADE/WP.4/GE.2/R.50). The Working Party is now engaged in the preparation of descriptions of the functions performed by each of these documents, with a view to establishing internationally agreed descriptions of their functions. Within the Working Party agreement has already been reached on data elements, i.e. groups of words carrying information, used in maritime and combined transport, and on descriptions of the functions of the sea waybill, the bill of lading, the combined transport document, the through bill of lading and the cargo declaration (TRADE/WP.4/123, annex).

11. Under the Joint FAO/WHO Food Standards Programme, the intergovernmental *Codex Alimentarius Commission* and its subsidiary bodies elaborated comprehensive international food standards and international maximum limits for pesticide residues in food. These standards were then adopted by the *Codex Alimentarius Commission* and circulated to Governments for acceptance and implementation by national legislation. The implementation by Governments of these international food standards and maximum limits for pesticide residues in their national legislation serves as a means of reducing some of the technical, non-tariff obstacles to the free flow of international trade in food.

12. ICC is continuing its work aimed at a general

² Background material may be found in the reports referred to in paragraph 2 above and in the *Digest of legal activities of international organizations and other international institutions*, published under the auspices of the International Institute for the Unification of Private Law (UNIDROIT).

revision of the existing INCOTERMS with a view to adapting these trade terms to recent developments in transport and documentation and facilitating their acceptance by all countries. The ICC is also engaged in completing its INCOTERMS 1953 by trade terms to be applied to sales involving air, containerized and combined transport.

13. A working group of CMI is engaged in the preparation of draft Charter Party (Laytime) Definitions.

14. The Sub-Committee on Banking Terminology of ISO is preparing an ISO banking glossary, covering the scope of the work of the ISO Technical Committee 68 on Banking Procedures, and related subjects and abbreviations.

D. Model contracts and contractual clauses

15. AALCC prepared standard forms of FOB and FAS contracts for sales transactions in certain types of commodities (e.g. grain, rubber, oil, coconut products, spices). A group of experts is expected to finalize shortly a standard form contract for CIF (Maritime) transactions and corresponding general conditions applicable in respect of light machinery and durable consumer goods. Member Governments, the secretariat of AALCC and the regional arbitration centres established by AALCC were asked to publicize these standard forms and to encourage their use in international transactions.

16. AALCC has also begun work on the formulation of standard contract forms in respect of:

- (i) Consultancy agreements, particularly those relating to the preparation of feasibility studies, engineering design and supervision of execution of projects;
- (ii) Construction contracts, particularly those relating to plant and machinery;
- (iii) The transfer of technology and know-how by means of licensing agreements; and
- (iv) Concession contracts in regard to the exploitation of natural resources and mineral deposits.

17. ECE, through its Group of Experts on International Contract Practices in Industry, is preparing a draft "Guide for Drawing up International Contracts between Parties Associated for the Purpose of Executing a Specific Project" (TRADE/GE.1/39). The secretariat of ECE will prepare a revised version of the draft Guide for the fourteenth session (October 1978) of the Group of Experts. At that session the Group of Experts will also consider its future programme of work.

18. The International Trade Division of ESCAP is engaged in the preparation of standard contracts and general conditions for use in the tropical hardwood trade in the region. Similar projects are also planned for such commodities as pepper, rubber and coconuts.

19. The Commission on International Commercial Practice of ICC is engaged in drafting model contractual clauses dealing with *force majeure* and hardship, particularly for long-term contracts and contracts that are to be performed in stages. This work is motivated by the fact that market instability, primarily due to inflation and the increasing cost of raw materials, poses serious difficulties in the performance of long-term contracts. These difficulties relate, *inter alia*, to the adaptation of such contracts to changing economic circum-

stances and to the computation of damages for breach of contract.

20. CMI is engaged in a comparative study of shipbuilding contracts, including the contract forms commonly used throughout the world. It is expected that the final report on the subject will be completed by the spring of 1979.

21. The secretariat of UNCTAD is studying the feasibility of drawing up model rules for regional associations (ports, shippers, shipowners) and joint ventures in the field of maritime transport. The model rules, which might then be published as a handbook, would be designed to assist co-operation among developing countries concerning shipping and ports.

E. Penalty clauses

22. On 20 January 1978 the Committee of Ministers of the Council of Europe adopted resolution (78) 3 concerning penal clauses in civil law. The resolution is particularly directed at penal clauses applicable in cases of breach of contract and includes, in an appendix, general principles that States should take into consideration when preparing new legislation on this subject.

III. INTERNATIONAL PAYMENTS

A. Work on conventions and uniform rules on international payments

23. The Commission of the European Communities is engaged in work aimed at the harmonization of the laws of member States of EEC concerning the law of surety and contract guarantees. A draft directive on the subject, revised on the basis of observations submitted by national administrations and professional bodies, is being prepared by the Commission.

24. Within the Council of Europe a committee of experts considered the international aspects of the legal protection accorded to creditors. The secretariat of the Council of Europe has been asked, based on the report presented by the committee of experts, to ascertain the particular topics in the area of creditors' rights that could be taken up by the Council of Europe with a view to finding common solutions for all of its member States.

25. ICC, in close co-operation with UNCITRAL, has drawn up Uniform Rules for Contract Guarantees (Tender, Performance and Repayment Guarantees). Draft uniform rules, accepted in principle by the ICC Commissions on International Commercial Practice and on Banking Technique and Practice, were circulated in 1976 to the ICC National Committees and, through UNCITRAL, to circles not represented within ICC. The Study Group on Contract Guarantees, in which the UNCITRAL secretariat is represented as observer, studied the comments received and the ICC Working Party on Contract Guarantees then approved a final draft of the uniform rules. The final draft, together with an introductory brochure, will be submitted for adoption to the ICC Council in June 1978.

26. ICC is co-operating with the UNCITRAL secretariat in work directed at the possible creation of a new type of security interest corresponding to the needs of international trade. This work is based on the exchange of views which took place in the ICC/

UNCITRAL Consultative Committee in December 1976.

27. ICC will publish in 1978 revised ICC Standard Forms for the Issuing of Documentary Credits. These forms are adapted to the revised text of the Uniform Customs and Practice for Documentary Credits and, in addition, their use by banks is made more simple.

28. ICC is continuing the revision of its Uniform Rules for the Collection of Commercial Paper.

29. Members of the staff of IMF are participating in the work of UNCITRAL directed at the preparation of a draft uniform law creating a new negotiable instrument for optional use in international transactions. IMF staff members have attended meetings under UNCITRAL auspices which were concerned with the preparation of questionnaires on the subject, the analysis of replies, and the consideration and drafting of provisions of the draft uniform law.

30. For the work of the Hague Convention on an international convention on the law applicable to negotiable instruments, see paragraph 79 below (VII. Private International Law; C. *International payments*).

B. Banking procedures

31. The International Bank for Economic Co-operation has established rules and conditions of participation for settlements in transferable rubles, both for international trade between member countries of the Bank and for international trade of these countries with non-member countries of the Bank. Further, in order to improve the system of settlements in transferable rubles, in 1977 certain amendments relating primarily to improvement of the accounting systems were approved to the Statutes of the International Bank for Economic Co-operation and to the Agreement of 22 October 1963 concerning multilateral settlements in transferable rubles and the organization of the International Bank for Economic Co-operation.

32. A Technical Committee (TC 68) of ISO continued its work on banking procedures. The Subcommittee on Bank Data Interchange dealt with the documents used for international information interchange, bank telecommunication messages and transactions involving the use of bank cards. The Subcommittee on Bank Operations considered the use of codes and algorithms, record retention and retrieval of information images, and questions concerning the international processing of securities. The Subcommittee on Terminology was particularly concerned with issues involving foreign exchange operations and fund transactions, bill and documentary operations and operations of account, and loan (credit) operations.

C. Value clauses in international conventions

33. CMI has prepared a draft Protocol to Amend the 1957 Brussels Convention on Limitation of Liability of Owners of Sea-Going Ships, substituting for the reference therein to Poincaré francs the unit of account adopted by the 1976 London Convention on Limitation of Maritime Claims. The CMI has prepared a similar Protocol to the 1924 Brussels Convention for the Unification of Certain Rules of Law relating to Bills of Lading.

34. From 28 February to 2 March 1977 an *ad hoc* meeting under the auspices of ECE examined the "unit

of account" provisions in ECE transport conventions and adopted draft protocols (TRANS/R.58-61) concerning the "unit of account" in the following conventions: Convention on the Contract for the International Carriage of Goods by Road (CMR) of 19 May 1956; Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR) of 1 March 1973; Convention relating to the Limitation of the Liability of Owners of Inland Navigation Vessels (CLN) of 1 March 1973; and Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Waterway (CVN) of 6 February 1976. The solution proposed in the draft protocols called for the use of the Special Drawing Rights of the International Monetary Fund as the "unit of account"; Contracting States who were not members of IMF or whose law did not permit the use of the Special Drawing Rights as a "unit of account" could however continue to rely on the value of gold as the "unit of account". At the thirty-seventh session of the Inland Transport Committee of ECE (30 January to 3 February 1978) the solution proposed in the draft protocols did not find general acceptance and the Committee decided to re-submit the problem to the *ad hoc* meeting (2-3 May 1978) in order to arrive at a solution acceptable to as many countries as possible.

D. Research on security arrangements

35. The Asian Development Bank has been associated with the Law Association for Asia and the Western Pacific (LAWASIA) in an extensive credit and security research project. This project involves the study of security arrangements available to national development banks and similar financial institutions situated in the region.

IV. INTERNATIONAL TRANSPORT

A. Transport by sea

36. ICS follows closely the work of the IMCO, and ICS has often submitted papers for consideration at various IMCO meetings.

37. In the long-term programme of IMCO, these items are included for consideration by the legal Committee:

- (i) Possible review of the 1926 Brussels Convention the Unification of Certain Rules Relating to Maritime Liens and Mortgages, and the 1967 revision thereof;
- (ii) Possible review of the Brussels Conventions on Maritime Law with a view to their being replaced by updated Conventions under the auspices of IMCO.

38. CMI submitted to IMCO for consideration the draft Convention on Offshore Mobile Craft and the draft Convention for the Unification of Certain Rules concerning Civil Jurisdiction, Choice of Law and Recognition and Enforcement of Judgements in Matters of Collision. Both these subjects are included in the future work programme of the IMCO Legal Committee.

39. The Committee on Shipping of UNCTAD considered in April 1977 a report prepared by the UNCTAD secretariat concerning the legal and economic consequences for international shipping of the existence or absence of a genuine link, as defined in inter-

national conventions that are in force, between a vessel and its flag of registry. This report will be reviewed by a group of experts in 1978 with a view to making recommendations for future action.

40. The UNCTAD Working Group on International Shipping Legislation met during the two parts of its fifth session to consider the work of UNCITRAL on the draft Convention on the Carriage of Goods by Sea. The UNCTAD secretariat prepared studies for the Working Group, analysing the draft provisions and suggesting modifications of the draft text where such were considered desirable (documents TD/B/C.4/ISL/19 and Suppl. 1 and 2; TD/B/C.4/ISL/23). The UNCTAD Working Group concluded that, taken as a whole, the draft convention adopted by UNCITRAL at its ninth session was generally acceptable and recommended to the General Assembly that an international conference of plenipotentiaries be convened under the joint auspices of UNCITRAL and UNCTAD to conclude a Convention on the Carriage of Goods by Sea. This recommendation was adopted by the Trade and Development Board of UNCTAD.

41. The subject of charter-parties forms part of the work programme of the UNCTAD Working Group on International Shipping Legislation. The Working Group in 1975 requested the UNCTAD secretariat to undertake, in addition to its report on "Charter-parties" (TD/B/C.4/ISL/13), two major studies which are now in progress: a comparative analysis of clauses in time-charter contracts, and a comparative analysis of clauses in voyage-charter contracts. Based on these studies and additional background material, the UNCTAD Working Group will seek to identify the clauses in time- and voyage-charter parties that are susceptible to standardization, harmonization and improvement. It will also explore areas in maritime chartering activities that may be regulated by international legislation. The Working Group is expected to consider these studies in 1979.

42. The UNCTAD Working Group on International Shipping Legislation is also to consider the legal problems of marine insurance at its 1978 session. In preparation, the UNCTAD secretariat is preparing a study analysing the existing legal problems in marine hull and cargo insurance, caused e.g. by ambiguities, inequities or lacunae in standard policy clauses and unsatisfactory procedures for the settlement of claims.

B. Transport by inland waterway

43. The Working Party on Inland Water Transport, a subsidiary body of the Inland Transport Committee of ECE, considered at its twenty-first session (14-18 November 1977) three draft conventions concerning the legal status of air-cushion vehicles, which had been prepared by UNIDROIT and transmitted to IMCO. The Working Party advised IMCO that in its view these conventions should not apply *expressis verbis* to inland waterways, but should include a clause to the effect that each Contracting State could extend the scope of application of these conventions to its inland waterways.³

44. The subject of the carriage of goods by inland waterway is on the work programme of UNIDROIT, although work on a draft Convention on the Contract

for the Carriage of Goods by Inland Waterway has been suspended.

C. Transport of nuclear waste material

45. In November 1977, the Executive Committee of CMEA approved rules governing the transportation by rail aiming CMEA member States of waste material from nuclear fuel.

46. CMEA is now engaged in the preparation of rules that will govern the water transport among CMEA member States of waste material from nuclear fuel.

D. Transport over land

47. In 1977, the Standing Commission on Transport of CMEA completed a new transit tariff for international railways and new rates for the use of freight cars within the system of the common rolling stock. On 27 July 1977 representatives of the ministries in charge of railways in Bulgaria, Hungary, the German Democratic Republic, Mongolia, Poland, Romania, the Union of Soviet Socialist Republics and Czechoslovakia signed an Agreement to bring into effect the above-mentioned international railways transit tariff.

48. OCTI will convene in 1980 the 8th Ordinary Revision Conference, which will consider the restructuring and modification of the CIM Convention (concerning the contract for the international carriage of goods by rail) and the CIV Convention (concerning the contract for the international carriage of passengers and baggage by rail). This Revision Conference will have the opportunity to consider also the possible harmonization of the transport law concerning international railway carriage with the transport laws governing other modes of international transport.

49. The Group of Experts on the Transport of Perishable Foodstuffs, a subsidiary body of the Inland Transport Committee of the United Nations Economic Commission for Europe, is continuing its work to amend the technical annexes of the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be Used for such Carriage.

50. The Inland Transport Committee of ECE has completed its work on the substantive provisions of a draft agreement on the introduction of automatic coupling of railway cars (TRANS/SC.2/146, annex 1). However, certain basic decisions concerning, e.g., the date of introduction and the apportionment of the necessary commitments among Governments and railway administrations, still remain to be taken.

51. The Transport and Communications Division of ESCAP recently prepared a preliminary draft of an Asian-Pacific Agreement concerning Compulsory Insurance against Civil Liability in respect of Motor Vehicles. The draft Agreement, which is intended to ensure the regulated, smooth flow of international vehicular traffic in the region, has been circulated widely for comments and suggestions.

52. At a meeting convened by ECLA a group of experts prepared a draft Latin American Convention on Civil Responsibilities and International Land-based Carriers.

E. Transport by air

53. The general work programme of the Legal Committee of ICAO includes the item "Consolidation of the

³ For the work of UNIDROIT on the subject of air-cushion vehicles, see para. 55 below (IV. International transport; F. Transport by air-cushion vehicles).

instruments of the 'Warsaw System' into a single convention". After the Legal Committee concluded that the preparation of such a consolidated text was premature the Council of ICAO on 10 December 1976 referred to the ICAO Legal Bureau the task of preparing two draft "texts of convenience": one consolidating the provisions of the instruments of the "Warsaw System" that are in force, and the other consolidating all the instruments of that system. The Legal Bureau was asked to send these draft texts to States for their comments.

54. ICAO is concerned with the lease, charter and interchange of aircraft in international operations because of the legal problems affecting the regulation and enforcement of air safety when an aircraft registered in one State is operated by an operator belonging to another State. The Legal Committee of ICAO had concluded in 1964 that the best way of solving these problems would be to delegate, on the basis of model bilateral agreements, the functions of the State of registry to the State of the operator of the aircraft concerned. In April 1976 the Council of ICAO established an expert panel which prepared a report on the problems arising from the lease, charter and interchange of aircraft in international operations and explored alternative solutions to the problems. In spring 1977 a special sub-committee of the ICAO Legal Committee met to consider this matter.

F. *Transport by air-cushion vehicles*

55. Three UNIDROIT draft Conventions concerning the legal status of air-cushion vehicles, the draft Convention on the Registration and Nationality of Air-Cushion Vehicles, the draft Convention relating to the International Carriage of Passengers and their Luggage by Sea and by Inland Waterway in Air-Cushion Vehicles and the draft Convention on the Civil Liability of Owners of Air-Cushion Vehicles for Damage Caused to Third Parties, were transmitted to IMCO. Consideration of these draft Conventions is included in the work programme of the Legal Committee of IMCO.⁴

G. *Multimodal transport*

56. The Central Office for International Transport by Rail (OCTI) has noted that harmonization of the transport laws governing the various modes of international transport would be helpful to the development of an international legal régime concerning multimodal transport. In 1980, the 8th Ordinary Revision Conference, which will review the CIM and CIV Conventions, will have the opportunity to consider the possible harmonization of these transport laws.

57. In July 1975 ICC revised its Uniform Rules for a Combined Transport Document, mainly in order to make liability for delay in delivery subject to the "network" system. Since that time these Uniform Rules have been implemented widely. The ICC has been working with several international trade organizations on the alignment of the combined transport documents issued by these organizations with the ICC Uniform Rules. The ICC already approved a combined

transport document called "COMBIDOC", issued jointly by the Baltic and International Maritime Conference (BIMCO) and the International Shipowners Association (INSA).

58. An UNCTAD Intergovernmental Preparatory Group is charged with the elaboration of a preliminary draft of a Convention on International Multimodal Transport. To assist the Intergovernmental Preparatory Group, the UNCTAD secretariat has prepared studies on various economic, social, technical and financial aspects of multimodal transport operations. In February 1977 the Group tentatively adopted a number of draft provisions on the scope of application of the draft Convention and of the multimodal transport document. In November 1977 the Group adopted, also tentatively, draft provisions on customs questions related to international intermodal transport and considered the principles that should govern consultations between providers and users of multimodal transport services.

59. In Autumn 1978 the UNCTAD Intergovernmental Preparatory Group is expected to consider alternative draft provisions prepared by the UNCTAD secretariat on the liability of multimodal transport operator and on claims and actions arising under the draft Convention. At that time the Group will also examine, *inter alia*, questions concerning general average, conflicts with other conventions, the scope of application and the final clauses of the draft Convention. It is expected that the General Assembly will convene in 1979 a diplomatic conference to consider the adoption of a Convention on International Multimodal Transport.

60. ICS sends representatives to the sessions of the UNCTAD Intergovernmental Preparatory Group on a Convention on International Multimodal Transport and assists in the intersessional work of preparing papers on issues under review by the Preparatory Group.

V. *INTERNATIONAL COMMERCIAL ARBITRATION*

A. *Activities concerning specialized types of arbitration*

61. It is expected that, during 1978, the United Nations ECE Arbitration Rules for Certain Categories of Perishable Agricultural Products (AGRI/WP.1/GE.7/60) will be adopted by the Committee on Agricultural Problems ECE. In accordance with these rules, the Committee on Agricultural Problems will then cast lots to decide whether the presidency of the United Nations ECE Chamber for Arbitral Procedure in Agriculture, which is to be held alternatively for two-year terms by persons representing the designated trade groups in Eastern Europe and the corresponding groups in Western Europe, should be held by a person from Eastern or from Western Europe for the initial two-year period. The members of the United Nations/ECE Chamber for Arbitral Procedure in Agriculture will be elected by the ECE Working Party on Standardization of Perishable Produce at its annual session in July 1978 and the rules will then become operational.

62. The International Centre for Technical Expertise, established by ICC in December 1976, provides the parties to a contract with the means of calling upon the assistance of an expert when disagreements of a technical nature occur concerning the performance of the contract. The ICC Rules for Technical Expertise

⁴ For the comment of the Working Party on Inland Water Transport of ECE on these three UNIDROIT draft conventions, see para. 43 above (IV. International transport; B. *Transport by inland waterway*).

contain specific procedures for choosing experts and establish the conditions under which experts may hear disputes. For parties wishing to have the possibility of utilizing the services of the Centre, ICC recommends a model clause that can be included in international contracts.

63. ICC, in close co-operation with CMI, is studying the possibility of establishing a joint centre for international maritime arbitration.

64. ICC has noted that the ICC Rules of Arbitration are too general for use in the settlement of disputes that are on the borderline between arbitration and joint power of attorney. This occurs where arbitrators are to serve as a regulating influence during the performance of long-term contracts, either by filling gaps in such contracts or by adapting the contracts to changed circumstances. To meet this particular need, the ICC Working Party on Specialized Types of Arbitration drafted a set of Rules on the Regulation of Contractual Relations.

B. *Information on arbitration laws and practice*

65. ICC has recognized that the persons involved in international trade need easily accessible and reliable sources of knowledge concerning the arbitration laws in various countries. ICC is therefore preparing a new publication on the law relating to arbitration throughout the world, replacing the outdated document II that had been published in 1955.

66. The ICC/UNCITRAL Consultative Committee will undertake a study of the difficulties arising from article V (1) (e) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and of the problems connected with applications to set aside arbitral awards made in the countries where the awards were rendered.

67. ICC conducts a series of arbitration seminars, designed to inform international and company lawyers about international arbitration techniques. In addition, these seminars provide a forum where specialists from all over the world and ICC can exchange ideas and thus contribute to the continuous evolution of international arbitration techniques.

68. While preserving the confidentiality of arbitral awards rendered by the ICC Court of Arbitration, the International Chamber of Commerce is preparing a compilation of excerpts from awards which contain legal solutions of general interest. This will be a semi-annual publication by ICC.

69. As of 1 January 1978, IACAC has adopted as its Rules the UNCITRAL Arbitration Rules, amended however to allow for administration of the arbitration proceedings by IACAC. IACAC is named in the 1975 Inter-American Convention on International Commercial Arbitration as the administering institution for international commercial arbitration in the Western hemisphere in all cases in which the parties have not provided otherwise.

70. For the work of ICC on drafting guidelines for use by arbitrators in determining the law applicable to the substance of a dispute, see paragraph 77 below (VII. Private international law; A. Arbitration).

C. *Furtherance of arbitration on the regional level*

71. AALCC is in the process of establishing re-

gional arbitration centres in Cairo, Kuala Lumpur and in either West or East Africa. Member Governments of AALCC were invited to avail themselves of the facilities provided by these centres.

72. The International Trade Division of ESCAP is now engaged in identifying possible areas of co-operation with both international and national organizations with a view to the harmonization and unification, on the regional level, of the law applicable to international commercial arbitration.

VI. PRODUCTS LIABILITY

73. The Commission of the European Communities has commenced work on the harmonization of the laws of member States of EEC concerning liability for damage resulting from the use of defective products (products liability). A draft directive on the subject was submitted by the Commission to the Council of Ministers of the EEC on 9 July 1976.

74. The European Convention on the Liability of Producers for Bodily Injury or Death, prepared by a committee of experts under the auspices of the Council of Europe, was opened for signature on 27 January 1977. The Convention has so far been signed by Austria, Belgium, France and Luxembourg and it will enter into force when ratified by three member States of the Council of Europe.

75. The Working Party on Road Transport of the United Nations Economic Commission for Europe is interested in the possible elaboration of an international instrument concerning third party liability for damage caused by the carriage of hazardous substances and has invited UNIDROIT to give a higher priority to the study of this subject.

76. The Legal Committee of ICAO is considering the preparation of a new international instrument on the question of liability for damage caused by noise and sonic boom.

VII. PRIVATE INTERNATIONAL LAW

A. *Arbitration*

77. Within ICC, the Working Party on Conflict of Laws established by the Commission on International Commercial Practice is engaged in the drafting of guidelines to be used by arbitrators when determining the law applicable to the merits of the dispute.

B. *International sale of goods*

78. The Hague Conference is considering the preparation of a Protocol to the 1955 Convention on the Law Applicable to International Sale of Goods, that would either permit States Parties to that Convention not to apply it to consumer sales or would exclude consumer sales from the scope of application of that Convention. It is expected that a draft Protocol to the 1955 Convention will be submitted to the fourteenth session of the Hague Conference in 1980.

C. *International payments*

79. The Hague Conference is considering the possibility of preparing an international convention on the law applicable to negotiable instruments. The Permanent Bureau of the Hague Conference will take into

account, in the course of preparing preliminary studies on the conflict of laws concerning negotiable instruments, the work of other organizations on the subject, particularly that of UNCITRAL.

D. Licensing agreements and know-how

80. The Hague Conference is examining the possibility of drafting an international convention on the law applicable to licensing agreements and know-how. In this work the Hague Conference is in contact with other interested international organizations, particularly with WIPO. The Permanent Bureau of the Hague Conference is now engaged in the collection of information and documentation on the subject.

VIII. AUTOMATIC DATA PROCESSING

81. Within ECE, an informal team established by the Working Party on Facilitation of International Trade Procedures is examining the elimination of legal obstacles to the introduction of electronic data processing systems for the transport of goods (TRADE/WP.4/GE.2/R.103). This team is also engaged in analysing the replies to a request by the Customs Co-operation Council for information on national customs requirements in respect of facsimile signatures on documents (TRADE/WP.4/GE.2/R.81).

82. In the view of ICC, the growing reliance on automatic data processing in international commercial transactions has created a situation in which uniform rules standardizing international practice which apply only to transactions that involve actual paper documents are no longer sufficient. Developments in transport technology, such as high speed aircraft and containerized transport of cargo, call for a matching acceleration in data flow. The long-term solution for speeding up the data flow in international trade calls for advanced automatic data processing techniques. Such techniques may range from simply transmitting data by telex to the sophisticated use of computers. Automatic data processing can replace—and in some areas is already replacing—the traditional documentary flow of information in international trade. However, at present automatic data processing cannot satisfy all the requirements for data flow that exist either under international conventions, under various national laws or under international commercial and financial practices. Problems arise, e.g. when the data flow is necessary for authentication to meet legal or commercial requirements, for controlling the transfer of ownership of goods, or for determining whether payment is justified. The ICC has set up a Working Party charged with identifying the banking and commercial problems involved in the use of automatic data processing in international trade, working in close co-operation with interested intergovernmental organizations, particularly ECE and UNCITRAL.

83. For the work of WIPO on the protection of computer programmes and computer software, see A/CN.9/129/Add.1 (Yearbook . . . 1977, part two, VI, B), paragraphs 25-26.⁵

⁵ The information furnished by the secretariat of WIPO in 1977 regarding the current work of that organization in the field of international trade law was reproduced *verbatim* in document A/CN.9/129/Add.1. In 1978 the secretariat of WIPO advised the United Nations Secretariat that the description of the current work of WIPO given in A/CN.9/129/Add.1 remained accurate and therefore needed no bringing up to date.

IX. INDUSTRIAL AND INTELLECTUAL PROPERTY LAW

A. Industrial property

(a) Industrial property in general

84. For the work of WIPO on revision of the Paris Convention for the Protection of Industrial Property, see A/CN.9/129/Add.1, paragraphs 4-5.

85. For the work of WIPO regarding the implementation of international treaties in the field of industrial property, see *ibid.*, paragraph 11.

86. For the work of WIPO aimed at the promotion of domestic inventive and innovative capacity, see *ibid.*, paragraph 48.

87. The Committee on the Development of Trade of ECE is engaged in drawing up a manual on licensing procedures and related aspects of technology transfer. An *ad hoc* meeting is scheduled to take place in November 1978 to consider information on the practice at the national level in the member States of ECE.

88. For the work of the Hague Conference on the law applicable to licensing agreements and know-how, see paragraph 80 above (VII. Private international law; D. Licensing agreements and know-how).

(b) Industrial designs

89. For the work of WIPO concerning regulations for implementation of the Hague Agreement and the 1975 Geneva Protocol thereto, see A/CN.9/129/Add.1, paragraph 9.

(c) Standard classification, forms and documentation for industrial property (work by WIPO)

90. For the work of WIPO on standard documentation and forms, administrative instructions, and international classifications, see *ibid.*, paragraphs 12-17.

(d) Legal publications and legislative texts (work by WIPO)

91. For the work of WIPO concerning the publication of records of diplomatic conferences, see *ibid.*, paragraphs 50-51.

92. For the work of WIPO concerning the publication of legislative texts on industrial property, trademarks and copyright, see *ibid.*, paragraphs 52-55.

93. For other legal publications by WIPO, such as periodic reviews, authentic texts of international treaties, and various surveys and studies, see *ibid.*, paragraphs 28-29, 49, 56-57.

B. Copyright

94. Concerning the servicing by WIPO of the meetings of various intergovernmental bodies established under international treaties in the field of copyright, see *ibid.*, paragraphs 3, 22-24.

C. Patents

95. For the work of WIPO aimed at the establishment of a system for the international recording of scientific discoveries, see *ibid.*, paragraph 1.

96. For information on the 1977 Diplomatic Conference for the Adoption of a Treaty on the International

Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, see *ibid.*, paragraph 2.

97. The heads of the patent offices of the member States of CMEA completed in 1977 the preparation of a standard bilateral agreement on patent retrieval and examination of applications for patents within the framework of scientific and technological co-operation among the member States of CMEA. Also in 1977, the intergovernmental agreement on mutual acceptance of author's certificates and other documents protecting patents and inventions, which had been signed on 18 December 1976, came into force.

98. Work is continuing with CMEA on an intergovernmental agreement establishing a single unified document designed to protect inventions.

D. Trademarks

99. For the work of WIPO on revision of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, see A/CN.9/129/Add.1, paragraph 6. For the work of WIPO aimed at revision of other international agreements dealing with trademarks, see *ibid.*, paragraphs 7-8.

100. For information on the trademark searches conducted by WIPO with respect to common names for pesticides proposed by the International Organization for Standardization, see *ibid.*, paragraph 19.

101. The Commission of the European Communities is engaged in work aimed at the creation of a community-wide law concerning trademarks for products and for services. In particular, the Commission is preparing a draft regulation relating to the establishment of a community trademark.

E. New varieties of plants (work by WIPO)

102. For the work of WIPO relating to the International Convention for Protection of New Varieties of Plants, see A/CN.9/129/Add.1, paragraphs 10, 20-21.

F. Industrial and intellectual property matters of particular relevance to developing countries (work by WIPO)

(a) Model laws for developing countries

103. For the work of WIPO on model laws, intended primarily for developing countries, in the field of industrial and intellectual property, see A/CN.9/129/Add.1, paragraphs 30-41.

(b) Glossaries and manuals for developing countries

104. For information on the preparation by WIPO of glossaries and manuals for developing countries in the fields of industrial property and copyright, see *ibid.*, paragraphs 46-47.

(c) Guidelines on industrial property utilization (work by WIPO)

105. For the work of WIPO on a Guide on the Legal Aspects of the Negotiation and Preparation of Industrial Property Licenses and Technology Transfer Agreements Appropriate to the Needs of Developing Countries, see *ibid.*, paragraphs 42-43.

106. For information concerning a study by WIPO of the problems of national publication and dissemination of foreign works protected by copyright, see *ibid.*, paragraph 44.

107. For the preparation by WIPO of a commentary to the Berne Convention on the Protection of Literary and Artistic Works, see *ibid.*, paragraph 45.

(d) Training and assistance in the field of industrial and intellectual property

108. WIPO has fulfilled requests from developing countries for technical co-operation relating to revision of industrial property or copyright legislation, modernization of industrial property or copyright administrations and training of staff of such administrations. WIPO has also provided technical assistance to regional organizations such as the African Intellectual Property Organization.

109. WIPO has also provided a number of traineeships and conducted regional seminars and training courses in developing countries.

X. OTHER TOPICS OF INTERNATIONAL TRADE LAW

A. Law of agency

110. The Commission of the European Communities has commenced work toward harmonization of the laws of member States of EEC concerning the practice of the profession of "commercial agent". A draft directive on the subject was prepared and submitted by the Commission to the Council of Ministers of EEC in December 1976.

111. In December 1976 Romania, informed UNIDROIT of its readiness to host a diplomatic conference that would consider the adoption of the draft Convention providing a Uniform Law on Agency of an International Character in the Sale and Purchase of Goods which had been completed by a Committee of Government Experts under UNIDROIT auspices. UNIDROIT has accepted the invitation extended by the Government of Romania and the diplomatic conference will be held in Bucharest, Romania, in May-June 1979.

B. Company law

112. The Commission of the European Communities will continue in 1978 its work directed at the harmonization of the company laws of member States of EEC. The Commission will be engaged in the preparation of draft directives on the merger of companies (*sociétés anonymes*), the contents and dissemination of prospectus containing stock offerings, and the consolidated accounting by groups of related companies (*comptes du groupe*). In addition, an *ad hoc* working group of the Council of Ministers of the EEC will examine the draft Statute for European Companies (*le Statut des sociétés anonymes européennes*), which is aimed at the creation of a community-wide law on companies (*un droit communautaire des sociétés anonymes*).

C. Consumer protection

113. On 16 November 1976 the Committee of Ministers of the Council of Europe adopted resolution (76) 47 concerning unjust clauses in contracts con-

cluded by consumers. The resolution, *inter alia*, recommends that States create effective legal instruments to protect consumers against unjust clauses in contracts relating to the furnishing of goods and services, particularly in contracts concluded on the basis of standard contract forms or under circumstances where the consumer had no real opportunity to negotiate the terms of the contract. The Council of Europe is now considering the role of public and private organizations in defending the collective interests of consumers by judicial and other means.

114. The Commission of the European Communities is continuing its work on a programme of consumer protection, which includes the subject of consumer credit. The Commission has prepared and submitted to the Council of Ministers of EEC as at 1 December 1977 five draft directives concerning the protection of consumers.

115. For information concerning an examination by WIPO of unfair competition, particularly as it affects the interests of consumers, see A/CN.9/129/Add.1, paragraph 27.

D. Acquisition of movable goods

116. UNIDROIT is engaged in negotiations with a view to convening a diplomatic conference that would consider the adoption of the draft Convention Providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables which had been prepared by UNIDROIT.

E. Law of evidence

117. The European Committee on Legal Co-operation of the Council of Europe has recommended that in 1978 consideration be given to the effects on the law of evidence of the new document-reproduction and information-storage procedures. A committee of experts will meet in 1978 to consider the preparation of one or more international instruments on the subject.

F. International factoring

118. A restricted exploratory group established by UNIDROIT considered in February 1978 the necessity or usefulness of preparing uniform rules for the contract of factoring. The exploratory group was of the view that a uniform law applicable to international factoring should be drawn up. The conclusions of the exploratory group will be placed before the Governing Council of UNIDROIT, which will decide upon the method of future work on the subject.

G. International leasing

119. In March 1977 a working group established by UNIDROIT considered the feasibility of preparing uniform rules for contracts of leasing, in the light of the fiscal aspects of such contracts and their relationship with the law of security interests. Based on a recommendation by this working group, UNIDROIT decided in May 1977 to set up a Study Group charged with the preparation of uniform rules for the contract of leasing. At its first session in Rome, 17-19 November 1977, the Study Group decided to concentrate on the form of equipment leasing generally referred to as financial leasing and drew up a provisional draft definition of the

financial leasing operation. For the next session of the Study Group, scheduled for autumn 1978, the secretariat of UNIDROIT will prepare a draft set of rules on various aspects of the financial leasing operation.

H. Law relating to pipelines

120. UNIDROIT circulated a questionnaire to Governments to ascertain their interest in unifying or harmonizing certain aspects of the law relating to pipelines. The UNIDROIT secretariat has prepared an analysis of the replies and the analysis will be placed before the Governing Council of UNIDROIT.

I. Warehousing

121. Dr. Hill (United Kingdom) prepared a preliminary report on the warehousing contract for UNIDROIT. In the light of observations by Governments and interested organizations on this report, UNIDROIT established a Study Group which will consider the drawing up of uniform provisions concerning the warehousing contract.

XI. FACILITATION OF INTERNATIONAL TRADE

A. Co-operation for expansion of international trade

122. Within CMEA work is continuing on the preparation of a draft model agreement and statute for an international economic union and of draft regulations concerning the working conditions of the employees of this economic union.

123. Within ECE, an informal team established by the Working Party on Facilitation of International Trade Procedures is examining the legal problems of trade facilitation (TRADE/WP.4/GE.2/R.102).

124. Within ECE, in February 1978 the Working Party on Facilitation of International Trade Procedures agreed on recommendations concerning documentation for dangerous goods and the content and type of information that should appear in documents for the transport of dangerous goods. The Working Group also agreed on recommendations concerning documentation practices and techniques and developed a form, aligned with the United Nations/ECE Layout Key, for use when special forms are required in the transport of dangerous goods (TRADE/WP.4/GD.2/R.99).

125. The Group of Experts on Customs Questions affecting Transport, a subsidiary body of the Inland Transport Committee of ECE, is continuing to consider the extension of the territorial scope of application of the Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention), including the possibility of establishing a link among the different existing customs transit systems. The ECE Committee on Inland Transport, through its subsidiary bodies, is studying the question of harmonizing the conditions for Customs and other controls at frontiers, including the possibility of an international agreement on the subject.

126. At its thirty-fourth session (7-17 March 1978), ESCAP decided to maintain close contacts both with international and national organizations dealing with matters related to international trade law. ESCAP intends to co-operate with such organizations at the regional level in order to identify appropriate areas for

co-operation. In addition, the Transport and Communications Division of ESCAP is preparing documents detailing the main points of important international instruments and the steps States need to take to implement these international instruments at the national level.

127. The Joint FAO/WHO Food Standards Programme is intended to protect consumers against possible health hazards in food, to ensure fair practices in the food trade and to facilitate international trade in food. These international standards reduce the technical, non-tariff obstacles to international trade in food and can be used as a means of promoting the food industry of developing countries by increasing their ability to export to countries with detailed legislation on food standards.

128. ICS is actively involved in the work of ECE on trade facilitation. ICS regularly submits papers and sends representatives to sessions of the ECE Working Party on the Facilitation of International Trade Procedures, the ECE Group on Automatic Data Processing and Coding and the ECE Group on Data Requirements and Documentation. The ECE Working Party on the Facilitation of International Trade Procedures has issued several ECE Recommendations which the ICS secretariat has promoted among its members.

129. An *Ad Hoc* Group of Experts established by UNCTAD is engaged in formulating a set of equitable, multilaterally agreed-upon principles and rules for the control of restrictive business practices that have adverse effects on international trade, particularly on trade by developing countries. The *Ad Hoc* Group is scheduled to hold two sessions during 1978. Furthermore, the Trade and Development Board of UNCTAD was requested to facilitate institutional arrangements with regard to the negotiations on multilaterally agreed equitable principles and rules concerning restrictive business practices.

130. An *Ad Hoc* Group of Experts established by UNCTAD is engaged in the elaboration of a model law or laws on restrictive business practices in order to assist developing countries in devising appropriate legislation on the subject.

131. UNIDO is concerned with the general area of international contractual arrangements in the industrial development field, with particular reference to transfers of technology, sale or leasing of industrial equipment and comprehensive industrial co-operation agreements. The work by UNIDO involves both sectoral consultations and global studies.

132. UNIDO and UNCTAD collaborate in the area of trade and trade-related aspects of industrial development. In that context UNIDO participates in the activities of UNCTAD concerning law and contractual practices.

B. Facilitation of co-operation in production

133. The Legal Conference of representatives of member States of CMEA is continuing its work aimed at assisting the development of general terms of specialization and co-operation in production by the CMEA member States.

134. In 1977, at a meeting of the representatives on

legal affairs of the member States of CMEA, draft model treaties and agreements were prepared on the establishment of an international scientific and technological organization and of a joint laboratory supported by the CMEA member States.

C. Transfer of technology

135. The international transfer of technology is included in the work programme of AALCC. At the 1979 session of AALCC there will be a preliminary exchange of views, aimed at identifying the relevant issues on the basis of the work of UNCTAD on a Code of Conduct for the Transfer of Technology.

D. Economic offences

136. AALCC has included in its work programme the subject of reciprocal assistance in regard to prevention, investigation and prosecution of economic offences, with a view to preparing a draft convention. Information on the subject is now being collected from Governments on the basis of a questionnaire. A meeting of a special working group will be convened when sufficient information becomes available from Governments in the AALCC region.

E. Elimination of double taxation

137. To promote the future development of economic, scientific, technological and cultural co-operation between member States of CMEA, its Standing Commission on Monetary and Financial Questions prepared an intergovernmental agreement on the elimination of double income and property taxation of physical persons. The CMEA member States signed this Agreement on 27 May 1977. An agreement to eliminate double income and property taxation of juridical persons of the CMEA member States is now under preparation.

F. Information on international trade law developments

138. The Committee on the Development of Trade of ECE is continuing its examination of the feasibility of a possible future multilateral system of notification of laws and regulations concerning foreign trade and changes therein (MUNOSYST). In 1978 the Committee will continue the experiment initiated in 1977 of notifications, covering a limited scope of activities, by those Governments that offered to send such notifications. The ECE secretariat has been requested to draw up and circulate a questionnaire aimed at identifying primary and secondary sources of information in member States of ECE. Based on the replies to the questionnaire and experience gained through the experimental voluntary notifications, the ECE secretariat will submit a further study on MUNOSYST to the twenty-seventh session of the Committee on the Development of Trade (November 1978).

139. The Trade Promotion Centre of the International Trade Division of ESCAP has been concerned with the dissemination, and training directed to explaining the existing law in the field of international trade.

I. TEXTS ADOPTED BY THE UNITED NATIONS CONFERENCE ON THE CARRIAGE OF GOODS BY SEA (HAMBURG, 6-31 MARCH 1978)*

A. Final Act (A/CONF.89/13)

1. The General Assembly of the United Nations, having considered chapter IV of the report of the United Nations Commission on International Trade Law on the work of its ninth session in 1976,** which contained a draft Convention on the Carriage of Goods by Sea, decided, by its resolution 31/100 of 15 December 1976, that an international conference of plenipotentiaries should be convened in 1978 in New York, or at any other suitable place for which the Secretary-General might receive an invitation, to consider the question of the carriage of goods by sea and to embody the results of its work in an international convention and such other instruments as it might deem appropriate. Subsequently, the Secretary-General received and accepted an invitation from the Government of the Federal Republic of Germany that the conference be convened at Hamburg.

2. The United Nations Conference on the Carriage of Goods by Sea was held at Hamburg, Federal Republic of Germany, from 6 to 31 March 1978.

3. Seventy-eight States were represented at the Conference, as follows: Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Bolivia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Chile, Colombia, Cuba, Czechoslovakia, Democratic Yemen, Denmark, Ecuador, Egypt, Finland, France, Gabon, German Democratic Republic, Germany, Federal Republic of, Ghana, Greece, Holy See, Honduras, Hungary, India, Indonesia, Iran, Iraq, Ireland, Italy, Ivory Coast, Jamaica, Japan, Kenya, Kuwait, Liberia, Madagascar, Malaysia, Mauritius, Mexico, Netherlands, Nigeria, Norway, Oman, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Senegal, Sierra Leone, Singapore, Spain, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Cameroon, United Republic of Tanzania, United States of America, Venezuela, Yugoslavia and Zaire.

4. One State, Guatemala, sent an observer to the Conference.

5. The General Assembly requested the Secretary-General to invite representatives of organizations that have received a standing invitation from the General Assembly to participate in the sessions and the work of all international conferences convened under its auspices, in the capacity of observers, in accordance with General Assembly resolution 3237 (XXIX) of 22 November 1974; to invite representatives of the national liberation movements recognized in its region by the Organization of African Unity, in the capacity of observers, in accordance with General Assembly resolution 3280 (XXIX) of 10 December 1974, and to invite the specialized agencies and the International Atomic Energy Agency, as well as interested organs of the United Nations and other interested inter-governmental organizations, and interested non-governmental organizations, to be represented at the Conference by observers. The following inter-governmental and non-governmental organizations accepted this invitation and were represented by observers at the Conference:

Specialized agencies

International Monetary Fund
Inter-governmental Maritime Consultative Organization

United Nations bodies

United Nations Conference on Trade and Development
Economic Commission for Africa

Other inter-governmental organizations

Caribbean Community and Common Market
Central Office for International Railway Transport
Council of Europe
Organisation for Economic Co-operation and Development

Non-governmental organizations

Baltic and International Maritime Conference
International Chamber of Commerce
International Chamber of Shipping
International Maritime Committee
International Shipowners' Association
International Union of Marine Insurance
Latin American Association of Shipowners.

6. The Conference elected Mr. Rolf Herber (Federal Republic of Germany) as President.

7. The Conference elected as Vice-Presidents the representatives of the following States: Algeria, Argentina, Australia, Belgium, Canada, Cuba, Denmark, Ecuador, German Democratic Republic, Greece, Indonesia, Iraq, Italy, Nigeria, Pakistan, Philippines, Poland, Senegal, Turkey, Uganda, Union of Soviet Socialist Republics and Venezuela.

8. The following Committees were set up by the Conference:

General Committee

Chairman The President of the Conference
Members The President and Vice-Presidents of the Conference, and the Chairman of the First and of the Second Committee

First Committee

Chairman Mr. Mohsen Chafik (Egypt)
Vice-Chairman... Mr. S. Suchorzewski (Poland)
Rapporteur Mr. D. M. Low (Canada)

Second Committee

Chairman Mr. D. Popov (Bulgaria)
Vice-Chairman... Mr. Th. J. A. M. De Bruijn (Netherlands)
Rapporteur Mr. N. Gueiros (Brazil)

Drafting Committee

Chairman Mr. R. K. Dixit (India)
Members Argentina, Australia, Ecuador, France, German Democratic Republic, Hungary, India, Iraq, Japan, Kenya, Norway, Peru, Sierra Leone, Singapore, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania and United States of America

Credentials Committee

Chairman Mrs. Helifah Haji Yusof (Malaysia)
Members Bangladesh, Canada, Czechoslovakia, Ecuador, Madagascar, Malaysia, Nigeria, Syrian Arab Republic and United States of America

9. The Secretary-General of the United Nations was represented by Mr. Erik Suy, the Legal Counsel of the United Nations, from 6 to 11 March and subsequently by Mr. Blaine Sloan, Director of the General Legal Division, Office of Legal Affairs of the United Nations. Mr. Willem Vis, Chief of the International Trade Law Branch of the General Legal Division of the Office of Legal Affairs of the United Nations, acted as Executive Secretary.

10. The General Assembly, by its resolution 31/100 of 15 December 1976 convening the Conference, referred to the Conference, as the basis for its consideration of the carriage of goods by sea, the draft Convention on the Carriage of Goods by Sea contained in chapter IV of the report of the United Nations Commission on International Trade Law on the work of its ninth session (A/CONF.89/5), the text of draft provisions concerning implementation, reservations and other final clauses prepared by the Secretary-General (A/CONF.89/6 and Add.1 and 2), the comments and proposals by Governments and international organizations (A/CONF.89/7 and Add.1) and an analysis of these comments and proposals prepared by the Secretary-General (A/CONF.89/8).

* The official records of the United Nations Conference on the Carriage of Goods by Sea will be collected in document A/CONF.89/14.

** *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)* (Yearbook . . . 1976, part one, II, A).

11. The Conference assigned to the First Committee the text of the draft Convention on the Carriage of Goods by Sea and the draft provision on reservations from the draft provisions concerning implementation, reservations and other final clauses prepared by the Secretary-General. The Conference assigned to the Second Committee the other draft provisions concerning implementation, reservations and other final clauses.

12. On the basis of the deliberations recorded in the summary records of the Conference (A/CONF.89/SR.1-10), the summary records of the First Committee (A/CONF.89/C.1/SR.1-37) and its report (A/CONF.89/10), and the summary records of the Second Committee (A/CONF.89/C.2/SR.1-11) and its report (A/CONF.89/11), the Conference drew up the UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA, 1978.

13. That Convention, the text of which is annexed to this Final Act (annex I), was adopted by the Conference on 30 March 1978 and

was opened for signature at the concluding meeting of the Conference on 31 March 1978. It will remain open for signature at United Nations Headquarters in New York until 30 April 1979, after which date it will be open for accession, in accordance with its provisions.

14. The Convention is deposited with the Secretary-General of the United Nations.

15. The Conference also adopted a "common understanding" and a resolution, the texts of which are also annexed to this Final Act (annexes II and III).

IN WITNESS WHEREOF the representatives have signed this Final Act.

DONE at Hamburg, Federal Republic of Germany, this thirty-first day of March, one thousand nine hundred and seventy-eight, in a single copy in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

B. United Nations Convention on the Carriage of Goods by Sea, 1978 (A/CONF.89/13, annex I)

PREAMBLE

THE STATES PARTIES TO THIS CONVENTION

HAVING RECOGNIZED the desirability of determining by agreement certain rules relating to the carriage of goods by sea,

HAVE DECIDED to conclude a Convention for this purpose and have thereto agreed as follows:

PART I. GENERAL PROVISIONS

Article 1. Definitions

In this Convention:

1. "Carrier" means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.

2. "Actual carrier" means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.

3. "Shipper" means any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.

4. "Consignee" means the person entitled to take delivery of the goods.

5. "Goods" includes live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if supplied by the shipper.

6. "Contract of carriage by sea" means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea.

7. "Bill of lading" means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

8. "Writing" includes, *inter alia*, telegram and telex.

Article 2. Scope of application

1. The provisions of this Convention are applicable to all contracts of carriage by sea between two different States, if:

(a) The port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or

(b) The port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or

(c) One of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or

(d) The bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or

(e) The bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

2. The provisions of this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.

3. The provisions of this Convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.

4. If a contract provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this Convention apply to each shipment. However, where a shipment is made under a charter-party, the provisions of paragraph 3 of this article apply.

Article 3. Interpretation of the Convention

In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.

PART II. LIABILITY OF THE CARRIER

Article 4. Period of responsibility

1. The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.

2. For the purpose of paragraph 1 of this article, the carrier is deemed to be in charge of the goods

(a) From the time he has taken over the goods from:

(i) The shipper, or a person acting on his behalf; or

(ii) An authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment;

- (b) Until the time he has delivered the goods:
 - (i) By handing over the goods to the consignee; or
 - (ii) In cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or
 - (iii) By handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.
3. In paragraphs 1 and 2 of this article, reference to the carrier or to the consignee means, in addition to the carrier or the consignee, the servants or agents, respectively of the carrier or the consignee.

Article 5. Basis of liability

1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.

3. The person entitled to make a claim for the loss of goods may treat the goods as lost if they have not been delivered as required by article 4 within 60 consecutive days following the expiry of the time for delivery according to paragraph 2 of this article.

4. (a) The carrier is liable

- (i) For loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;
- (ii) For such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents, in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.

(b) In case of fire on board the ship affecting the goods, if the claimant or the carrier so desires, a survey in accordance with shipping practices must be held into the cause and circumstances of the fire, and a copy of the surveyor's report shall be made available on demand to the carrier and the claimant.

5. With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.

6. The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.

7. Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.

Article 6. Limits of liability

1. (a) The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

(b) The liability of the carrier for delay in delivery according to

the provisions of article 5 is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.

(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 (a) of this article, the following rules apply:

(a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.

3. Unit of account means the unit of account mentioned in article 26.

4. By agreement between the carrier and the shipper, limits of liability exceeding those provided for in paragraph 1 may be fixed.

Article 7. Application to non-contractual claims

1. The defences and limits of liability provided for in this Convention apply in any action against the carrier in respect of loss or damage to the goods covered by the contract of carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise.

2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

3. Except as provided in article 8, the aggregate of the amounts recoverable from the carrier and from any persons referred to in paragraph 2 of this article shall not exceed the limits of liability provided for in this Convention.

Article 8. Loss of right to limit responsibility

1. The carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

2. Notwithstanding the provisions of paragraph 2 of article 7, a servant or agent of the carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

Article 9. Deck cargo

1. The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations.

2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert in the bill of lading or other document evidencing the contract of carriage by sea a statement to that effect. In the absence of such a statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier is not entitled to invoke such an agreement against a third party, including a consignee, who has acquired the bill of lading in good faith.

3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article or where the carrier may not under paragraph 2 of this article invoke an agreement for carriage on deck, the carrier, notwithstanding the provisions of paragraph 1 of article 5, is liable for loss of or damage to the goods, as well as for delay in delivery, resulting solely from the carriage on deck, and the extent of his liability is to be determined in accordance with the provisions of article 6 or article 8 of this Convention, as the case may be.

4. Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of article 8.

Article 10. Liability of the carrier and actual carrier

1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.

2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of paragraph 2 of article 8 apply if an action is brought against a servant or agent of the actual carrier.

3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or waives rights conferred by this Convention affects the actual carrier only if agreed to by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement.

4. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.

5. The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Convention.

6. Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier.

Article 11. Through carriage

1. Notwithstanding the provisions of paragraph 1 of article 10, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named person other than the carrier, the contract may also provide that the carrier is not liable for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage. Nevertheless, any stipulation limiting or excluding such liability is without effect if no judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of article 21. The burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence rests upon the carrier.

2. The actual carrier is responsible in accordance with the provisions of paragraph 2 of article 10 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge.

PART III. LIABILITY OF THE SHIPPER

Article 12. General rule

The shipper is not liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part.

Article 13. Special rules on dangerous goods

1. The shipper must mark or label in a suitable manner dangerous goods as dangerous.

2. Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper must inform him of the dangerous character of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character:

(a) The shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and

(b) The goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

3. The provisions of paragraph 2 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character.

4. If, in cases where the provisions of paragraph 2, subparagraph (b), of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 5.

PART IV. TRANSPORT DOCUMENTS

Article 14. Issue of bill of lading

1. When the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading.

2. The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.

3. The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.

Article 15. Contents of bill of lading

1. The bill of lading must include, *inter alia*, the following particulars:

(a) The general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

(b) The apparent condition of the goods;

(c) The name and principal place of business of the carrier;

(d) The name of the shipper;

(e) The consignee if named by the shipper;

(f) The port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading;

(g) The port of discharge under the contract of carriage by sea;

(h) The number of originals of the bill of lading, if more than one;

(i) The place of issuance of the bill of lading;

(j) The signature of the carrier or a person acting on his behalf;

(k) The freight to the extent payable by the consignee or other indication that freight is payable by him;

(l) The statement referred to in paragraph 3 of article 23;

(m) The statement, if applicable, that the goods shall or may be carried on deck;

(n) The date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; and

(o) Any increased limit or limits of liability where agreed in accordance with paragraph 4 of article 6.

2. After the goods have been loaded on board, if the shipper so demands, the carrier must issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1 of this article, must state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier, the shipper must surrender such document in exchange for a "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.

3. The absence in the bill of lading of one or more particulars referred to in this article does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 7 of article 1.

Article 16. Bills of lading: reservations and evidentiary effect

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.

2. If the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.

3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:

(a) The bill of lading is *prima facie* evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

(b) Proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.

4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k) of article 15, set forth the freight or otherwise indicate that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, is *prima facie* evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier is not admissible when the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

Article 17. Guarantees by the shipper

1. The shipper is deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against the loss resulting from inaccuracies in such particulars. The shipper remains liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity in no way limits his liability under the contract of carriage by sea to any person other than the shipper.

2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss resulting from the issuance of the bill of lading by the carrier, or by a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, is void and of no effect as against any third party, including a consignee, to whom the bill of lading has been transferred.

3. Such letter of guarantee or agreement is valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including a consignee, who acts in reliance on the description of the goods in the bill of lading. In the latter case, if the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier has no right of indemnity from the shipper pursuant to paragraph 1 of this article.

4. In the case of intended fraud referred to in paragraph 3 of this article the carrier is liable, without the benefit of the limitation of liability provided for in this Convention, for the loss incurred by a third party, including a consignee, because he has acted in reliance on the description of the goods in the bill of lading.

Article 18. Documents other than bills of lading

Where a carrier issues a document other than a bill of lading to evidence the receipt of the goods to be carried, such a document is *prima facie* evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods as therein described.

PART V. CLAIMS AND ACTIONS

Article 19. Notice of loss, damage or delay

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the carrier not later than the working day after the day when the goods were handed over to the consignee, such handing over is *prima facie* evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.

2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within 15 consecutive days after the day when the goods were handed over to the consignee.

3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

4. In the case of any actual or apprehended loss or damage the carrier and the consignee must give all reasonable facilities to each other for inspecting and tallying the goods.

5. No compensation shall be payable for loss resulting from delay in delivery unless a notice has been given in writing to the carrier within 60 consecutive days after the day when the goods were handed over to the consignee.

6. If the goods have been delivered by an actual carrier, any notice given under this article to him shall have the same effect as if it had been given to the carrier, and any notice given to the carrier shall have effect as if given to such actual carrier.

7. Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the carrier or actual carrier to the shipper not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2 of article 4, whichever is later, the failure to give such notice is *prima facie* evidence that the carrier or the actual carrier has sustained no loss or damage due to the fault or neglect of the shipper, his servants or agents.

8. For the purpose of this article, notice given to a person acting on the carrier's or the actual carrier's behalf, including the master or the officer in charge of the ship, or to a person acting on the shipper's behalf is deemed to have been given to the carrier, to the actual carrier or to the shipper, respectively.

Article 20. Limitation of actions

1. Any action relating to carriage of goods under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

2. The limitation period commences on the day on which the carrier has delivered the goods or part thereof or, in cases where no

goods have been delivered, on the last day on which the goods should have been delivered.

3. The day on which the limitation period commences is not included in the period.

4. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

5. An action for indemnity by a person held liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted. However, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.

Article 21. Jurisdiction

1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) The principal place of business or, in the absence thereof, the habitual residence of the defendant; or

(b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) The port of loading or the port of discharge; or

(d) Any additional place designated for that purpose in the contract of carriage by sea.

2. (a) Notwithstanding the preceding provisions of this article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.

(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest.

3. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.

4. (a) Where an action has been instituted in a court competent under paragraph 1 or 2 of this article or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted;

(b) For the purpose of this article the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action;

(c) For the purpose of this article, the removal of an action to a different court within the same country, or to a court in another country, in accordance with paragraph 2 (a) of this article, is not to be considered as the starting of a new action.

5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an action, is effective.

Article 22. Arbitration

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relat-

ing to carriage of goods under this Convention shall be referred to arbitration.

2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.

3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

(a) A place in a State within whose territory is situated:

(i) The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

(ii) The place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(iii) The port of loading or the port of discharge; or

(b) Any place designated for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

5. The provisions of paragraphs 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.

6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.

PART VI. SUPPLEMENTARY PROVISIONS

Article 23. Contractual stipulations

1. Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, is null and void.

2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention.

3. Where a bill of lading or any other document evidencing the contract of carriage by sea is issued, it must contain a statement that the carriage is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.

4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 3 of this article, the carrier must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The carrier must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

Article 24. General average

1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage by sea or national law regarding the adjustment of general average.

2. With the exception of article 20, the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

Article 25. Other conventions

1. This Convention does not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.

2. The provisions of articles 21 and 22 of this Convention do not prevent the application of the mandatory provisions of any other multilateral convention already in force at the date of this Convention relating to matters dealt with in the said articles, provided that the dispute arises exclusively between parties having their principal place of business in States members of such other convention. However, this paragraph does not affect the application of paragraph 4 of article 22 of this Convention.

3. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or

(b) By virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

4. No liability shall arise under the provisions of this Convention for any loss of or damage to or delay in delivery of luggage for which the carrier is responsible under any international convention or national law, relating to the carriage of passengers and their luggage by sea.

5. Nothing contained in this Convention prevents a Contracting State from applying any other international convention which is already in force at the date of this Convention and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than transport by sea. This provision also applies to any subsequent revision or amendment of such international convention.

Article 26. Unit of account

1. The unit of account referred to in article 6 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency in terms of the Special Drawing Right of a Contracting State which is not a member of the International Monetary Fund is to be calculated in a manner determined by that State.

2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, or at the time of ratification, acceptance, approval or accession, or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as:

12,500 monetary units per package or other shipping unit or 37.5 monetary units per kilogramme of gross weight of the goods.

3. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in paragraph 2 into the national currency is to be made according to the law of the State concerned.

4. The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned in paragraph 3 of this article is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in article 6 as is expressed there in units of account. Contracting States must communicate to the depositary the manner of calculation pursuant to paragraph 1 of this article, or the result of the

conversion mentioned in paragraph 3 of this article, as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this article and whenever there is a change in the manner of such calculation or in the result of such conversion.

PART VII. FINAL CLAUSES

Article 27. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 28. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States until 30 April 1979 at the Headquarters of the United Nations, New York.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. After 30 April 1979, this Convention will be open for accession by all States which are not signatory States.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 29. Reservations

No reservations may be made to this Convention.

Article 30. Entry into force

1. This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the 20th instrument of ratification, acceptance, approval or accession.

2. For each State which becomes a Contracting State to this Convention after the date of the deposit of the 20th instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply the provisions of this Convention to contracts of carriage by sea concluded on or after the date of the entry into force of this Convention in respect of that State.

Article 31. Denunciation of other conventions

1. Upon becoming a Contracting State to this Convention, any State party to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 (1924 Convention) must notify the Government of Belgium as the depositary of the 1924 Convention of its denunciation of the said Convention with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

2. Upon the entry into force of this Convention under paragraph 1 of article 30, the depositary of this Convention must notify the Government of Belgium as the depositary of the 1924 Convention of the date of such entry into force, and of the names of the Contracting States in respect of which the Convention has entered into force.

3. The provisions of paragraphs 1 and 2 of this article apply correspondingly in respect of States parties to the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924.

4. Notwithstanding article 2 of this Convention, for the purposes of paragraph 1 of this article, a Contracting State may, if it deems it desirable, defer the denunciation of the 1924 Convention and of the 1924 Convention as modified by the 1968 Protocol for a maximum period of five years from the entry into force of this Convention. It will then notify the Government of Belgium of its intention. During this transitory period, it must apply to the Contracting States this Convention to the exclusion of any other one.

Article 32. Revision and amendment

1. At the request of not less than one-third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention, is deemed to apply to the Convention as amended.

Article 33. Revision of the limitation amounts and unit of account or monetary unit

1. Notwithstanding the provisions of article 32, a conference only for the purpose of altering the amount specified in article 6 and paragraph 2 of article 26, or of substituting either or both of the units defined in paragraphs 1 and 3 of article 26 by other units is to be convened by the depositary in accordance with paragraph 2 of this article. An alteration of the amounts shall be made only because of a significant change in their real value.

2. A revision conference is to be convened by the depositary when not less than one-fourth of the Contracting States so request.

3. Any decision by the conference must be taken by a two-thirds majority of the participating States. The amendment is communicated by the depositary to all the Contracting States for acceptance and to all the States signatories of the Convention for information.

4. Any amendment adopted enters into force on the first day of the month following one year after its acceptance by two-thirds of the

Contracting States. Acceptance is to be effected by the deposit of a formal instrument to that effect, with the depositary.

5. After entry into force of an amendment a Contracting State which has accepted the amendment is entitled to apply the Convention as amended in its relations with Contracting States which have not within six months after the adoption of the amendment notified the depositary that they are not bound by the amendment.

6. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention, is deemed to apply to the Convention as amended.

Article 34. Denunciation

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Hamburg, this thirty-first day of March one thousand nine hundred and seventy-eight, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.

C. Common understanding adopted by the United Nations Conference on the Carriage of Goods by Sea (A/CONF.89/13, annex II)

It is the common understanding that the liability of the carrier under this Convention is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule.

D. Resolution adopted by the United Nations Conference on the Carriage of Goods by Sea (A/CONF.89/13, annex III)

The United Nations Conference on the Carriage of Goods by Sea,

Noting with appreciation the kind invitation of the Federal Republic of Germany to hold the Conference in Hamburg,

Being aware that the facilities placed at the disposal of the Conference and the generous hospitality bestowed on the participants by the Government of the Federal Republic of Germany and by the Free and Hanseatic City of Hamburg, have in no small measure contributed to the success of the Conference,

Expresses its gratitude to the Government and people of the Federal Republic of Germany, and

Having adopted the Convention on the Carriage of Goods by Sea on the basis of a draft Convention prepared by the United Nations Commission on International Trade Law at the request of the United Nations Conference on Trade and Development,

Expresses its gratitude to the United Nations Commission on International Trade Law and to the United Nations Conference on Trade and Development for their outstanding contribution to the simplification and harmonization of the law of the carriage of goods by sea, and

Decides to designate the Convention adopted by the Conference as the: "UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA, 1978", and

Recommends that the rules embodied therein be known as the "HAMBURG RULES".

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III. CHECK LIST OF UNCITRAL DOCUMENTS

List of documents before the Commission at its eleventh session

<i>Title or description</i>	<i>Document symbol</i>
A. GENERAL SERIES	
International payments: draft Convention on International Bills of Exchange and International Promissory Notes: report of the Working Group on International Negotiable Instruments on the work of its fifth session (New York, 18-29 July 1977)	A/CN.9/141
Report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977)	A/CN.9/142 and Add.1
International sale of goods: draft Convention on the Formation of Contracts for the International Sale of Goods: note by the Secretary-General	A/CN.9/143
Commentary on the draft Convention on the Formation of Contracts for the International Sale of Goods: report by the Secretary-General	A/CN.9/144
International sale of goods: incorporation of the provisions of the draft Convention on the Formation of Contracts for the International Sale of Goods into the draft Convention on the International Sale of Goods: report of the Secretary-General	A/CN.9/145
International sale of goods: analytical compilation of comments by Governments and international organizations on the draft Convention on the Formation of Contracts for the International Sale of Goods as adopted by the Working Group on the International Sale of Goods and on the draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods prepared by the International Institute for the Unification of Private Law: report of the Secretary-General	A/CN.9/146 and Add.1-4
International payments: draft Convention on International Bills of Exchange and International Promissory Notes: report of the Working Group on International Negotiable Instruments on the work of its sixth session (Geneva, 3-13 January 1978)	A/CN.9/147
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<i>Title or description</i>	<i>Document symbol</i>
Proposal by the Working Group composed of the representatives of Brazil, Egypt, Finland, India, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland: article 2	A/CN.9/XI/CRP.4
Proposal by the Union of Soviet Socialist Republics: article 3	A/CN.9/XI/CRP.5
Proposal by the Working Group composed of the representatives of Australia, Brazil, Finland, Hungary, Nigeria and Yugoslavia: article 4	A/CN.9/XI/CRP.6
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Proposal by the United Kingdom of Great Britain and Northern Ireland: article 8	A/CN.9/XI/CRP.8
Proposal by the Working Group composed of the representatives of Finland, Hungary, Mexico, Singapore, Uganda and the United Kingdom of Great Britain and Northern Ireland	A/CN.9/XI/CRP.9
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Proposal by the Working Group composed of the representatives of Chile, Greece, Ireland, Japan, Poland, Uganda and the United Kingdom of Great Britain and Northern Ireland: new article	A/CN.9/XI/CRP.11
Proposal by the United States of America	A/CN.9/XI/CRP.12
Proposal by the United Kingdom of Great Britain and Northern Ireland	A/CN.9/XI/CRP.13
Proposal by Australia: new article; article 15	A/CN.9/XI/CRP.14
Proposal by the Working Group composed of the representatives of Czechoslovakia, Germany, Federal Republic of, Indonesia, Spain and the United Republic of Tanzania	A/CN.9/XI/CRP.15
Proposal by the Working Group composed of the representatives of Finland, Ghana, Hungary, Japan, Kenya, the Philippines, the Union of Soviet Socialist Republics and the United States of America: articles 9 and 10	A/CN.9/XI/CRP.16
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C. INFORMATION SERIES

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A. WORKING PAPERS

Provisional agenda and annotations	A/CN.9/WG.2/L.4
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Report of the Secretary-General: analysis of unresolved matters in respect of the formation and validity of contracts for the international sale of goods	A/CN.9/WG.2/WP.28
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B. RESTRICTED SERIES

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Proposal by the representative of France on the meaning of silence	A/CN.9/WG.2 (IX)/CRP.5
Proposal by the representative of the Union of Soviet Socialist Republics, article 3	A/CN.9/WG.2 (IX)/CRP.6
Proposal by the representative of the Union of Soviet Socialist Republics, articles 3A, (X), 8 and 12	A/CN.9/WG.2 (IX)/CRP.7
Proposal by the representative of the United Kingdom of Great Britain and Northern Ireland, article 5	A/CN.9/WG.2 (IX)/CRP.8
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Article 4, as adopted by the Working Group on first reading	A/CN.9/WG.2 (IX)/CRP.11
Draft report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977)	A/CN.9/WG.2(IX)/ CRP.12 and Add.1-11
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